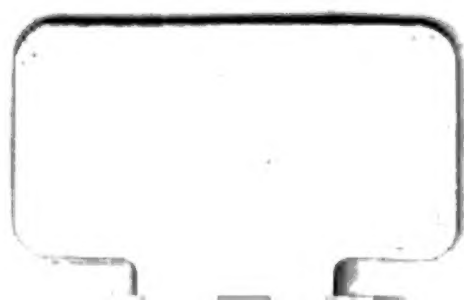




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UNITED STATES *June 21*
CIRCUIT COURTS OF APPEALS
REPORTS

WITH ANNOTATIONS

WITH TABLE OF CASES IN THE UNITED STATES CIRCUIT COURTS OF AP-
PEALS WHICH HAVE BEEN PASSED UPON BY THE SUPREME COURT
OF THE UNITED STATES, AND TABLE OF CASES IN THE UNIT-
ED STATES CIRCUIT COURTS OF APPEALS IN WHICH
REHEARINGS HAVE BEEN GRANTED OR DENIED.

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JUL 20 1908

AMENDMENTS TO RULES.*

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PER CURIAM.

January 18, 1908. Rule 23, and the order of March 18, 1895, relating thereto, are amended as follows:

(1) By inserting in paragraph 1 of said rule, after the words, "The parties may stipulate in writing that parts only of the record shall be printed" the words, "or that any number not less than ten printed copies of patents and other exhibits may be furnished."

(2) By substituting for the words "ten days," as they occur in the order of March 18, 1895, the words "fifteen days."

*For rule as previously amended, see 150 Fed. lxi, 79 C. C. A. lxiv.

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

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¹ Appointed November 16, 1907.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS.

(154 Fed. 647.)

McLURE v. LUKE.

(Circuit Court of Appeals, Ninth Circuit. June 3, 1907.)

No. 1,415.

1. BROKERS—ACTIONS FOR COMPENSATION—EVIDENCE OF PERFORMANCE OF CONTRACT.

Defendant entered into a written contract with plaintiff's intestate by which he agreed, in case he should purchase certain mining property at a stated price with the assistance of plaintiff's intestate, to pay the latter a commission. Three days after the death of the decedent a contract was executed by which defendant purchased the property with other property for slightly more than the price named. A witness also testified that on the day before the decedent's death defendant told him of the contemplated purchase, and asked him to ascertain if the decedent would not accept a sum in cash in lieu of an interest in the property which he was to receive under the commission contract. *Held*, that the contract of sale and such testimony were sufficient, *prima facie*, to establish that the decedent had performed the service that entitled him to the commission.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 116, 117.]

2. SAME—RIGHT TO COMPENSATION—ACTING FOR BOTH PARTIES.

Where a broker, although acting as agent for both the seller and purchaser of property, is given no discretionary power to negotiate the sale, but his employment is merely to bring the principals together and to keep them informed as to the condition of the property, the dual employment is not inconsistent nor contrary to public policy, and he may receive payment from both principals.¹

Ross, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Montana.

John B. Clayberg, Thos. C. Bach, and Ira T. Wight, for plaintiff in error.

E. C. Day, M. S. Wilson, and Charles H. Lovell, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and DE HAVEN, District Judge.

DE HAVEN, District Judge. This is an action at law brought by the plaintiff, as administrator of the estate of Charles S. Gibson, deceased, against L. S. McLure and Charles D. McLure, defendants. The complaint, in addition to other facts necessary to state a cause of action, sets forth that defendants agreed to pay to said Gibson, in the event of the purchase by them, for the sum of \$50,000, of the

¹ See note at end of case.

Broadwater group of mines in the county of Cascade, state of Montana, a commission of \$3,000, and $\frac{2}{100}$ interest in the property purchased, in return for his assistance in making such purchase, payment to be made at the time of the delivery of the deed of the property; that the property was purchased by the defendants for the price named, and the contract was fully performed upon the part of Gibson; that $\frac{2}{100}$ of the property purchased is of the value of \$2,000, and judgment is demanded for the sum of \$5,000. The evidence disclosed that the defendant Charles D. McLure was not a party to the contract referred to in the complaint, and the action was dismissed as to him. At the close of plaintiff's testimony, the remaining defendant, L. S. McLure, requested the court to instruct the jury to return a verdict for him. This request was refused, and, the defendant declining to introduce any evidence, the court instructed the jury to find for the plaintiff for the full amount sued for. The case is brought here by the defendant L. S. McLure on writ of error. There are various errors assigned, only one of which requires discussion, and that is the one which relates to the action of the court in instructing the jury to return a verdict in favor of the plaintiff.

1. In the consideration of the question presented for decision, it is necessary briefly to refer to the evidence, and to the issues made by the pleadings. The evidence shows that the defendant entered into the following contract with the deceased Gibson, in behalf of whose estate this action was brought:

"Nelhart, Dec. 1, 1899.

"Should I purchase the Broadwater group of mines and other property for the sum of fifty thousand dollars (and Charles S. Gibson assisting me in the making of said purchase) then in that event I agree to pay to the said Charles S. Gibson in return for above assistance a commission of three thousand dollars at the time of delivery of deed of above property to me.

"I also agree to give him two one-hundredths ($\frac{2}{100}$) interest in the property in lieu thereof in the event of the incorporation of a company by me on the said property, to give him $\frac{2}{100}$ two one-hundredths—of the capital stock of said company at the time of its incorporation in lieu of the said two one-hundredths interest in the property. Said stock to be non-assessable stock.

"The above agreement to be void if I do not purchase the property at the price above stated. L. S. McLure."

This agreement was set out in *hæc verba* in the defendant's answer, as the contract between himself and Gibson, and it was not alleged that it was intended by the parties thereto to include in such contract other property than the Broadwater group of mines; nor was it suggested at the trial that there was in the minds of the parties to the agreement any other property than that therein specifically mentioned, to wit, the Broadwater group of mines. This being so, the words "and other property," in the clause of the agreement describing the property to be purchased as "the Broadwater group of mines and other property," are to be regarded as surplusage, and the agreement construed as only applying to the Broadwater group of mines. Was the evidence sufficient to show that the contract as thus construed was performed by Gibson?

We agree with the contention of the defendant that under the pleadings it was incumbent upon the plaintiff to prove, first, that the prop-

erty mentioned in this contract was purchased by the defendant for the price named therein—\$50,000; and, second, that Gibson assisted him in making the purchase. For the purpose of showing these facts, the plaintiff introduced in evidence a written contract entered into between the owner of the Broadwater group of mines and the defendant L. S. McLure and Charles D. McLure, on April 17, 1900, by the terms of which the vendor was to sell and the defendants purchase the Broadwater group of mines; also all ores on the dumps, all tools, machinery, and implements of every kind and nature, used in and about said mines, for the sum of \$50,600. The contract further provided that, "in addition to the Broadwater group above mentioned, and as part of the property hereby agreed to be conveyed," the vendor "agrees to sell and convey by quitclaim deed all his right, title and interest in and to the tunnel site on the Enterprise No. 2, claim, * * * and also all and singular the certain quartz lode claim, known and described as the Key." The evidence shows that Gibson died on the 14th of April, 1900, three days before the execution of the agreement just referred to, and one witness testified that on the day before his death the defendant informed him of the contemplated purchase of the Broadwater group of mines, and of the contract which he had made with Gibson, and requested him to see the latter and ascertain if he would accept \$3,000 cash in lieu of stock in the company that was to be formed. The proposition was not made to Gibson, as he died before the witness had an opportunity to see him. This is all of the evidence tending to show performance of the contract sued on, on the part of Gibson, and was, we think, sufficient for that purpose in the absence of evidence to the contrary, and there is no such evidence. The proposition which the defendant authorized the witness referred to, to make to Gibson, was in substance one for a modification of the contract under which he was employed, and the offer so made shows that the defendant then recognized the right of Gibson to the commission stipulated for in his contract, and was in effect an implied admission by him that he had performed the service entitling him to the compensation provided for in that contract, and was therefore some evidence of that fact against the defendant making the admission. The agreement of April 17, 1900, by which the Broadwater group of mines and the other property therein described was purchased for \$50,600, is not of itself sufficient to prove that the price paid for the Broadwater group of mines exceeded \$50,000, as other property was included in that agreement. In the absence of evidence to the effect that the other property therein described was purchased for less than \$600, this agreement did not tend in any degree to weaken the force of the defendant's implied admission that the contract by which Gibson was employed had been fully performed by him.

It is argued, however, by counsel for the defendant, that the proposition to pay money in lieu of certificates of stock may have been intended to settle or compromise a disputed claim; but there is nothing in the evidence upon which to base such a supposition, as it contains no intimation that there was any dispute between defendant and Gib-

son as to the right of the latter to receive the compensation provided for in the contract sued on.

2. It is further contended by defendant, and this seems to be his main contention, that the court erred in directing a verdict for the plaintiff, because it appears from the pleadings that the deceased Gibson was acting for both the vendor and vendee in the matter of the sale of the Broadwater group of mines, and there was no evidence showing that the parties to that transaction knew that he was acting in such dual capacity. The principle for which the defendant contends is that it is *prima facie* contrary to public policy for a broker to act as agent for both vendor and vendee in a sale of property, and that, when such double employment is shown, the agent is not entitled to recover compensation from either of his principals, without proof that both of them knew of the dual capacity in which he acted, and consented thereto. This may be regarded as the statement of an elementary rule of law, and is supported by numerous authorities, among which the following may be cited: *Meyer v. Hanchett*, 43 Wis. 246; *Scribner v. Collar*, 40 Mich. 375, 29 Am. Rep. 541; *Leathers v. Canfield*, 45 L. R. A. 33, 117 Mich. 277, 75 N. W. 612; *Hobart v. Sherburne*, 66 Minn. 171, 68 N. W. 841; *Young v. Trainor*, 42 N. E. 139, 158 Ill. 428; *Hannan v. Prentis*, 124 Mich. 417, 83 N. W. 102; 19 Cyc. p. 279. It will be found upon examination that this principle of law is only applied in cases where the agent is clothed with some discretion in the matter of advising or negotiating the sale or purchase of property, where the duty which he owes to one principal is inconsistent with that which he owes to the other. The rule is based upon the doctrine that "the duty of an agent for a vendor is to sell the property at the highest price; and of the agent of the purchaser, to buy it for the lowest." *Farnsworth v. Hemmer*, 1 Allen (Mass.) 494, 79 Am. Dec. 756. When the fact of such inconsistent relation is either admitted or proved, the burden is then upon the agent to show that both principals had knowledge and consented to his acting in such dual capacity, and without such proof he is not entitled to recover compensation from either; but where the agency is not of this nature, where the agent is given no discretionary power to negotiate the sale, and his employment is merely to bring the principals together that they may make their own contract upon such terms as they may agree, the reason for the rule above stated ceases, and the agent is entitled to recover from both principals, if both have agreed to pay him for such services. *Rupp v. Sampson*, 16 Gray (Mass.) 401, 77 Am. Dec. 416; *Knauss v. Brewing Co.*, 142 N. Y. 70, 36 N. E. 867; *Empire State Ins. Co. v. American Cent. Ins. Co.*, 34 N. E. 201, 138 N. Y. 446.

The question then is, to which of these classes does the present case belong? There is nothing in the evidence to throw any light upon this question, as it does not disclose the scope of Gibson's agency, what assistance he was to render the defendant in making the purchase of the Broadwater group of mines, or what service he was to perform for the owner of the property sold. It is, however, admitted by the pleadings, that Gibson was to receive compensation from both parties to that transaction, and defendant claims that, such fact being admitted, the burden

of proof was upon the plaintiff to prove that both parties knew of and consented to such double employment. It is alleged in the answer, as one defense to the action, that Gibson was to receive compensation from the owner of the Broadwater group of mines, as well as from the defendant, for his services as broker in the matter of effecting a sale thereof, and that neither of his principals knew that Gibson was acting in such dual capacity. The plaintiff in his replication admits that Gibson was to receive compensation from both the defendant and the owner of the Broadwater group of mines, in the event that the defendant should become the purchaser thereof, but in this connection alleges:

"That in the effecting of the said sale the said Charles S. Gibson merely acted as agent in bringing the said parties together and in keeping them informed as to the condition of the property, and that he had nothing whatever to do with the fixing of the price for which the property was to be sold, or in determining as to whether or not either of the parties would accept the proposition so made by the other."

It will be seen from this that the replication in effect denies that Gibson's agency was one which gave him any discretion in the matter of negotiating a sale of the Broadwater group of mines, or imposed upon him any other duty in relation to such sale than that of a middleman, and keeping the parties "informed as to the condition of the property." The admission of the double agency being thus qualified, we think the burden was upon the defendant, under the authorities, to offer some proof to sustain the broad allegation of his answer in relation to the scope of Gibson's agency. In the absence of evidence tending to show that Gibson's agency was one which vested him with some discretion in the matter of negotiating the sale of the Broadwater group of mines plaintiff's replication is to be taken as true, and the case is thus brought within the rule of *Knauss v. Brewing Co.*, 142 N. Y. 70, 36 N. E. 867, in which case it was said:

"It is undeniable that where the broker or agent is invested with the least discretion, or where the party had the right to rely on the broker for the benefit of his skill or judgment in any such case, an employment of the broker by the other side in a similar capacity, or in one where, by possibility, his duty and his interests might clash, would avoid all his right to compensation. The whole matter depends upon the character of his employment. If A. is employed by B. to find him a purchaser for his house upon terms and conditions to be determined by B. when he meets the purchaser, I can see nothing improper or inconsistent with any duty he owes B. for A. to accept an employment from C. to find one who will sell his house to C. upon terms which they may agree upon when they meet; and there is no violation of duty, in such case, in agreeing for commissions from each party upon a bargain being struck, or in failing to notify each party of his employment by the other."

The fact admitted by the replication, that, in addition to his employment as a middleman, Gibson was also employed by the parties to give information as to the condition of the property, does not affect the question before us, as it cannot be said as matter of law that such an employment imposed upon Gibson any inconsistent duty in the matter of the conflicting interests of the vendor and vendee. There certainly is no presumption that Gibson was employed by either of his principals to deceive the other, to suppress facts within his knowl-

edge, or to give false information to the other as to the condition of the mines. The replication avers that he was to keep them informed as to the condition of the property, and this must be construed as an allegation that his contract with both was to furnish true information as to its condition, and the double employment for such purpose, was not contrary to public policy, as the duty which he owed to one under such contract, was not inconsistent with his duty to the other.

The judgment is affirmed.

ROSS, Circuit Judge (dissenting). I am unable to agree to the judgment in this case. As stated in the opinion, there is nothing in the evidence to disclose the scope of Gibson's agency. In the answer to the complaint the defendant set up:

"That Gibson was to receive compensation from the owner of the Broadwater group of mines, as well as from the defendant, for his services as broker in the matter of effecting a sale thereof, and that neither of his principals knew that Gibson was acting in such dual capacity."

The answer does not allege that Gibson's agency was one which gave him any discretion in the matter of negotiating a sale of the mines, or anything about the scope of that agency. The answer, therefore, contained nothing calling for or admitting of any denial in the replication of the scope of the agency; so that the statement in the replication, "that in the effecting of the said sale the said Charles S. Gibson merely acted as agent in bringing the said parties together, and in keeping them informed as to the condition of the property, and that he had nothing whatever to do with the fixing of the price for which the property was to be sold, or in determining as to whether or not either of the parties would accept the proposition so made by the other," cannot be properly regarded as a denial of anything contained in the answer, but only as an affirmative allegation on the part of the plaintiff, and one to be proved by the plaintiff. In the opinion of the court it is said:

"The admission of the double agency being thus qualified, we think the burden was upon the defendant, under the authorities, to offer some proof to sustain the broad allegation of his answer in relation to the scope of Gibson's agency."

But the answer does not contain any allegation at all in relation to the scope of Gibson's agency. The effect of the decision, therefore, it seems to me, is that an agent may act for a vendor in the sale of his property, his duty to the vendor being to sell it at the highest price, and at the same time, without knowledge of either of the principals, act as agent for the purchaser, his duty to him being to buy at the lowest price. Yet the law is, as I understand it, and as is stated in the opinion, that this cannot be permitted.

NOTE.

Rights of Brokers to Compensation from Both Parties.

I. IN GENERAL.

[a] Where a broker, employed to sell land on a commission, receives a commission from the buyer without the knowledge of the seller, he cannot recover his commission from the seller.

—(Cal. 1906) *Rauer's Law & Collection Co. v. Bradbury*, 3 Cal. App. 256, 84 Pac. 1007;

(N. Y. 1905) *Kaake v. Griswold*, 104 App. Div. 137, 93 N. Y. Supp. 459.

[b] Where a real estate broker, without consent of the parties, represented both the vendor and the vendee, he cannot recover commissions for the sale.

—(Mo. 1900) *Rosenthal v. Drake*, 82 Mo. App. 358;

(N. Y. 1855) *Pugsley v. Murray*, 4 E. D. Smith, 245.

[c] (Ala. 1904) Plaintiff was employed by defendant to find a purchaser for lands, and was also under an agreement with certain prospective purchasers by which he was to participate with them in the advantages of the purchase, if made. He induced these purchasers to inspect the lands, and, on their objecting to the price, which, unknown to them, included plaintiff's commissions from defendant, urged them to make the purchase, and finally induced them to agree to do so. Afterwards, when they discovered the dual character of plaintiff's agency, they refused to consummate the contract, and defendant refused to pay plaintiff commissions, whereupon he brought suit therefor. *Held*, that a charge that, if defendant employed plaintiff to find a purchaser at a price which would be satisfactory to defendant and the purchaser, defendant could not defeat the action by proof that plaintiff was also to be paid for services by the purchaser, was erroneous.—*Green v. Southern States Lumber Co.*, 141 Ala. 680, 37 South. 670.

[d] (Ala. 1904) A real estate broker who is negotiating a sale of property, or otherwise acting in the usual line of his business, cannot represent both parties to the transaction without their mutual knowledge and consent; and, if he attempts to do so, he forfeits all right to any compensation or commissions from either.—*Green v. Southern States Lumber Co.*, 141 Ala. 680, 37 South. 670.

[e] (Ill.) Where an agent in making a sale of real estate has acted as agent for the vendor as well as for the vendee, he cannot recover commissions from the vendee unless he brings the case within one of the established exceptions to the general rule that an agent cannot recover commissions from both parties to a transaction.—(1904) *Keach v. Bunn*, 116 Ill. App. 397, judgment affirmed *Bunn v. Keach* (1905) 214 Ill. 259, 73 N. E. 419.

[f] (Ill. 1905) Where plaintiffs, being agents for certain persons to purchase land, became the agents of the owner to sell it or find a purchaser therefor, without disclosing their agency for the other parties, and were also guilty of bad faith towards the owner, they are not entitled to commissions of the owner for a sale to the other persons, whether made by them or by the owner after they had brought the parties together.—*Bunn v. Keach*, 214 Ill. 259, 73 N. E. 419.

[g] (Mass. 1883) Where a broker is employed to sell a house, and effects a transaction by which such house is bought by another, who sells his house to a third person, the purchase and price paid by such other being dependent upon the purchase and the price paid by such third person, by whom the purchase money (the amount of which is the same in each case) is paid directly to the broker's immediate employer, who pays the broker a commission for his services in selling his house, the broker cannot recover a commission of such third person, even if he was employed by him to buy a house for him.—*Follansbee v. O'Reilly*, 135 Mass. 80.

[h] (Mich. 1879) It is well settled to be contrary to public policy to allow a broker to recover commissions from both the parties to a sale or exchange, neither of whom knew that he was acting for the other, although he acted in good faith.—*Scribner v. Collar*, 40 Mich. 375, 29 Am. Rep. 541.

[i] (Mich. 1889) P. and O., real estate brokers, having been commissioned to sell land, agreed to divide commissions with plaintiff, another broker, if he should find a purchaser. Before defendant purchased the lands, he had agreed to pay plaintiff one-half the profits he should realize from their sale, over and above the fixed price. *Held* that, though O. and P., and the owners of the lands, were ignorant of the contract, and plaintiff thus received a commission from both seller and purchaser, the contract was not in contravention of public policy, where it appears that the owners had fixed the prices they demanded before its execution, and had reposed no confidence in plaintiff to procure a higher price.—*Ranney v. Donovan*, 78 Mich. 318, 44 N. W. 276.

[j] (Mich. 1892) Where a person agrees to pay a real estate broker for finding a purchaser for his land at a fixed price, and the broker finds a purchaser, and a sale of such land is consummated, he is entitled to compensation therefor from the seller, though he also receives compensation from the purchaser for services rendered him.—*Montross v. Eddy*, 94 Mich. 100, 53 N. W. 916, 34 Am. St. Rep. 323.

[k] (Mich. 1898) An agent who is employed by a lumber company to negotiate with the owner of pine land for its purchase at a stated commission, and who acts in the negotiations always in the interest of the lumber company, and against the interest of the seller, cannot recover a commission for the sale from the seller.—*Leathers v. Canfield*, 117 Mich. 277, 75 N. W. 612, 45 L. R. A. 33.

[l] (Mich. 1901) Where, in an action to recover commissions for a sale of defendant's real estate, it was shown that plaintiff was not a middleman to bring the parties together, but that he first took a contract to himself from defendant, refusing to disclose who the purchaser was until he had secured the contract; that plaintiff had received a sum from the purchaser for his services in the matter; and that neither the vendor nor vendee knew the other was paying a commission—plaintiff could not recover from defendant.—*Horwitz v. Pepper*, 128 Mich. 688, 87 N. W. 1034.

[m] (Mich. 1903) A real estate agent having property of others for sale, who requests a prospective buyer to go with him to see the property, cannot charge the latter for his services and expenses in making such trip.—*Hale v. Knapp*, 134 Mich. 622, 96 N. W. 1060.

[n] (N. Y. 1850) In making a bargain, a broker can hardly act with fairness if he expects to be paid by both purchaser and seller. These two employments are entirely incompatible, and, having received commissions from one party, he cannot obtain additional compensation from the other.—*Watkins v. Cousall*, 1 E. D. Smith, 65.

[o] (N. Y. 1853) A broker employed by the owner of lands to procure a sale thereof to one who shall agree to take from the owner a loan, and improve the property, cannot, after recovering compensation from the owner of the property for effecting the sale, recover compensation from the purchaser for procuring the loan to him.—*Vanderpoel v. Kearns*, 2 E. D. Smith, 170.

[oo] (N. Y. 1853) One cannot be employed as an agent or broker for both purchaser and seller and earn a compensation from each, unless by a distinct arrangement between all who are concerned.—*Dunlop v. Richards*, 2 E. D. Smith, 181.

[p] (N. Y. 1895) A real estate agent, employed to buy certain property at a certain price, does not forfeit the commission which the purchaser agreed to pay him because he secured another commission from the vendor after the vendor had accepted the terms offered.—*Jones v. Henry* (Com. Pl.) 15 Misc. Rep. 151, 36 N. Y. Supp. 483.

[q] (N. Y. 1900) Where a real estate broker sustains a confidential relation to his employer, it is error, on the trial of his action for commission, to exclude evidence of a secret agreement with the opposite party to a sale for an additional commission, since such an agreement would violate the broker's good faith towards his employer, and hence preclude his recovery.—*Brierly v. Connelly*, 31 Misc. Rep. 268, 64 N. Y. Supp. 9.

[r] (N. Y.) Where a broker, having been engaged by a landlord to secure a tenant, was promised by persons who leased the premises, after the lease was made, that they would pay him his commissions if the landlord did not, such agreement did not release defendant from his obligation to compensate

the broker according to the original agreement between them.—(City Ct. 1900) *Minster v. Benollet*, 32 Misc. Rep. 630, 66 N. Y. Supp. 493, judgment reversed *Minster v. Benollet* (Sup. 1901) 33 Misc. Rep. 586, 67 N. Y. Supp. 1044.

[s] (N. Y. 1901) Where a correspondence between a broker and a vendor of land showed that the broker was merely seeking a vendor in the course of his employment for an intending purchaser, the broker was not entitled to commissions from the vendor.—*Curry v. Terry*, 34 Misc. Rep. 797, 69 N. Y. Supp. 932.

[t] (Pa. 1902) Where a broker is employed to effect a sale of realty at a fixed price for a named condition, and, without informing his employers, makes a like contract with the prospective purchaser, he is not entitled to recover commissions from the sellers.—*Linderman v. McKenna*, 20 Pa. Super. Ct. 409.

[u] (Tex. 1905) Where, in an action on a broker's contract for the sale of real estate, he alleged that after undertaking the sale for defendant he reported to him that he had a purchaser who had offered him \$5,000 in cash to bring about the purchase, and that defendant assented to plaintiff's acceptance of the joint employment, and stated that it would in no wise interfere with their contract, the petition was not demurrable as showing a forfeiture of plaintiff's right by his acceptance of an inconsistent employment.—*Shropshire v. Adams*, 89 S. W. 448.

[v] (Wash. 1906) A broker, employed to purchase land who conceals from the purchaser the fact that the vendor will pay the broker a commission on making a sale, has the burden of proving perfect fairness in the transaction, and, in the absence of satisfactory proof, equity will treat him as guilty of constructive fraud.—*Hanna v. Haynes*, 42 Wash. 284, 84 Pac. 861.

[w] (Wash. 1906) A purchaser employed a broker to purchase land under an agreement providing that the profits on a resale should be divided between them. The broker was informed by a third person that the owner of the land would sell for \$10,000 and pay a commission of \$500. The broker purchased the land for the purchaser and paid the owner \$9,500 and offered to pay \$500 to the third person as his commission who insisted that he should share with the broker in the profits on a resale. The broker paid \$250 to the third person and retained the balance and agreed to give him a half interest in the selling profits. *Held*, that the relation of principal and agent existed between the purchaser and the broker, and the broker was guilty of constructive fraud in concealing from the purchaser the fact that he received a commission from the owner, rendering the agreement between them voidable at the election of the purchaser.—*Hanna v. Haynes*, 42 Wash. 284, 84 Pac. 861.

[x] (Wash. 1906) A purchaser, employing a broker to purchase land under an agreement providing that the profits on a resale should be equally divided between them, discovered that the broker was guilty of constructive fraud, because of his agreement with the vendor for a commission on making a sale. The purchaser accepted the benefits of the services of the broker. *Held*, that the purchaser, in order to obtain a rescission of the agreement, must pay to the broker the value of his services.—*Hanna v. Haynes*, 42 Wash. 284, 84 Pac. 861.

[y] (Wis. 1877) Where plaintiffs were employed as brokers by defendant to sell his land, and defendant did not consent to their acting as agents for both parties, and they received a commission from the other party, they cannot recover a commission from defendant.—*Meyer v. Hanchett*, 43 Wis. 246.

[z] (Wis. 1905) Where a real estate agent, employed to sell the property for the highest price obtainable, arranged with a prospective purchaser to pay a commission under certain contingencies, this arrangement being made while the principal was urging the agent to obtain a higher price than that for which the property had formerly been offered, the agent was not entitled to commission on consummation of the sale to the purchaser who had agreed to pay commission.—*Tasse v. Kindt*, 125 Wis. 631, 104 N. W. 703.

[zz] (Eng. 1903) Where an agent, in effecting a sale of property for his principal, has taken a secret commission from the purchaser, the principal, notwithstanding that he has recovered from the agent the amount of the secret commission, is further entitled to recover back the commission which

he himself has paid to the agent.—*Andrew v. Ramsay & Co.*, 72 Law J. K. B. 865, [1903] 2 K. B. 635, 89 Law T. 450, 52 Wkly. Rep. 126.

II. MERELY BRINGING PARTIES TOGETHER.

[a] If the duty of a real estate broker is simply to bring together two persons who desire to exchange their lands, and the broker's entire duty is performed when he has brought them together, he is a mere middleman, not representing conflicting interests, and may receive compensation from both parties.

—(Cal. 1899) *Clark v. Allen*, 125 Cal. 276, 57 Pac. 985;

(Colo. 1893) *Manders v. Craft*, 3 Colo. App. 236, 32 Pac. 836.

[b] (Ky. 1892) As a rule a broker acting for both the vendor and purchaser in effecting an exchange of property can receive compensation from neither, their interests being incompatible; but where the agent representing both parties does nothing more than to bring them together, and does not aid or assist either in the trade, he can receive compensation from both.—*Delph v. Wain-scott*, 14 Ky. Law Rep. 304.

[c] (Mont. 1896) Where a broker's contract to procure a purchaser at a specified price simply requires him to bring his principal and purchaser together, so that they themselves can make their own contract, he may recover commissions from both parties on separate contracts with each.—*Childs v. Ptomey*, 17 Mont. 502, 43 Pac. 714.

[d] (N. Y.) Real estate brokers, employed as middlemen, to bring purchasers together to enable them to make their own bargain, may charge commissions to both parties, since they are not agents to buy and sell, and therefore not within the rule which prohibits their acting without consent as agents for both buyer and seller.—(1872) *Siegel v. Gould*, 7 Lans. 177; (1878) *Bal-helmer v. Reichardt*, 55 How. Prac. 414.

[e] (N. Y. 1894) Where a broker is employed merely to introduce a purchaser to the seller, without taking any part in the negotiations in consummation of the sale, his right to commissions promised him by the seller is not affected by the fact that, without the latter's knowledge, he was also receiving pay from the purchaser.—*Knauss v. Gottfried Krueger Brewing Co.*, 142 N. Y. 70, 36 N. E. 867, reversing (1891) 62 Hun, 46, 16 N. Y. Supp. 357.

[f] (N. Y. 1894) Where brokers employed to sell are not vested with any discretion respecting the price and terms of sale, they are mere middlemen, and may recover commissions from both parties.—*Haviland v. Price* (Com. Pl.) 6 Misc. Rep. 372, 26 N. Y. Supp. 757; *Bonwell v. Auld* (Com. Pl.) 9 Misc. Rep. 65, 29 N. Y. Supp. 15, affirming (1894) 7 Misc. Rep. 447, 27 N. Y. Supp. 936.

[g] (N. Y. 1898) A middleman, who brings the vendor and purchaser of real estate together, but does not negotiate the sale or its terms, is a broker, and may charge commissions to both parties.—*Southack v. Lane*, 23 Misc. Rep. 515, 52 N. Y. Supp. 687.

[h] (N. Y. 1901) Where a broker was merely authorized to find and introduce a person with whom his employer might effect an exchange of his property, and was not authorized to fix the value of the property or agree on any of the terms, his right to a commission was not affected by his also receiving a commission from the other party.—*Norton v. Genesee Nat. Savings & Loan Ass'n*, 57 App. Div. 520, 68 N. Y. Supp. 32.

[i] (N. Y. 1902) Where a broker, having secured a purchaser for a ferry, sued to recover commissions for the sale of another ferry by defendants to the same purchaser, and defendants contended that, if plaintiff had been employed to find a purchaser for the second ferry, he was not entitled to compensation for such sale because of an agreement between him and the purchaser whereby he was to receive compensation from the purchaser if he bought the first ferry, it was proper to charge that, if the plaintiff had nothing to do with the terms of the sale, and he was not intrusted with discretion, his arrangement for receiving compensation would not preclude recovery. Judgment (1900) 56 App. Div. 203, 67 N. Y. Supp. 688, affirmed.—*Gracie v. Stevens*, 171 N. Y. 658, 63 N. E. 1117.

III. EXCHANGE OF PROPERTY.

[a] A broker cannot represent and recover commissions from both the parties to an exchange of real estate, which he has negotiated.

—(D. C. 1879) *Bates v. Copeland*, 4 MacArthur, 50;

(Ky. 1869) *Lloyd v. Colston*, 68 Ky. (5 Bush) 587.

[b] The agent of different parties, who was employed to sell lands for each, brought about an exchange of the same property between the owners themselves. *Held*, that the agent was entitled to the customary commissions from each of his principals.

—(Ky. 1870) *Mullen v. Keetzleb*, 70 Ky. (7 Bush) 253;

(Mass. 1860) *Rupp v. Sampson*, 82 Mass. (16 Gray) 398, 77 Am. Dec. 416.

[c] (Mass. 1861) Where a broker has acted for both parties in negotiating an exchange of real estate between them, without informing either that he was employed by the other, evidence of a custom among brokers to charge a commission to both parties in such cases is inadmissible in an action by the broker to recover his commission from one of the parties, since such custom, if shown to exist, would be unreasonable, and contrary to good morals and sound policy.—*Farnsworth v. Hemmer*, 83 Mass. (1 Allen) 494, 79 Am. Dec. 756.

[d] (Mich. 1900) One who employs a broker to find a customer to exchange real estate with him has the right to assume that he is acting solely in his interest, and is not to receive a commission from the customer.—*Hannan v. Prentiss*, 124 Mich. 417, 83 N. W. 102.

[e] (Minn. 1902) Where a real estate broker is employed by an owner of lands to exchange them, and a third person, having information thereof from the broker, communicates through him with the owner and effects an exchange, there is no legal inference of an implied promise by the other party to pay the broker a commission for services.—*Dartt v. Sonnesyn*, 86 Minn. 55, 90 N. W. 115.

[f] (Neb. 1891) Plaintiff, a broker, was employed by defendant to sell certain city property, and effected an exchange of real estate with one P. After the transaction was complete, P. paid plaintiff \$100 for his services, although he testified that he had previously not employed him. *Held*, there being no charge of bad faith, that if defendant had employed plaintiff to sell his property, and he had procured a sale and exchange of the same upon terms satisfactory to defendant, he was entitled to a fair compensation for his services.—*Campbell v. Yager*, 32 Neb. 266, 49 N. W. 181.

[g] (N. Y. 1898) A real estate broker, engaged by defendant to secure an exchange of property, who, unknown to defendant, is also agent for the other contracting party, is not entitled to compensation from defendant.—*Norman v. Reuther*, 25 Misc. Rep. 161, 54 N. Y. Supp. 152.

[h] (Can. 1901) An agent, acting for and representing the vendor, is not entitled, in the absence of an agreement to that effect, to recover from the purchaser a commission on the value of land received by the vendor in exchange in part payment of the price of the land sold.—*Browne v. Gault*, Rap. Jud. Que. 19 C. S. 523.

IV. EFFECT OF KNOWLEDGE OF DUAL EMPLOYMENT.

[a] One who employs a real estate broker with knowledge that he is also acting for the other party to the agreement is liable for his services.

—(Ind. 1877) *Alexander v. Northwestern Christian University*, 57 Ind. 466;

(N. Y. 1895) *Lansing v. Bliss*, 86 Hun, 205, 33 N. Y. Supp. 310; (1897) *Abel v. Disbrow*, 15 App. Div. 536, 44 N. Y. Supp. 573; (1897) *Geery v. Pollock* (Sup.) 16 App. Div. 321, 44 N. Y. Supp. 673.

[b] Where a broker is employed by each party, with notice that he is acting in the matter for the other, and with such notice each agrees to pay him his commission, he can recover from both.

—(Minn. 1906) *Wasser v. Western Land Securities Co.*, 97 Minn. 460, 107 N. W. 160;

(N. Y. 1873) *Rowe v. Stevens*, 53 N. Y. 621; *Id.*, 35 N. Y. Super. Ct. (3 Jones & S.) 189;

(Pa. 1900) *Maxwell v. West*, 23 Pa. Co. Ct. R. 302, 30 Pittsb. Leg. J. (N. S.) 340.

[c] (Ark. 1907) Where a real estate agent, acting for both parties with their knowledge and consent in an exchange of land, misrepresented to one of the parties that the other was the owner of a certain farm and rated it at a certain value, when he knew the real owner was offering to sell for much less, such party was entitled to discharge him as agent, and the agent was not entitled to any commission for the exchange of property thereafter made between the parties.—*Featherston v. Trone*, 102 S. W. 196.

[d] (Ga. 1903) Where, in an action by a real estate agent for commissions, dual agency was relied on as a defense, it was necessary for defendant to prove, not only the fact of such agency, but that the same was not known to both parties.—*Red Cypress Lumber Co. v. Perry*, 118 Ga. 876, 45 S. E. 674.

[e] (Ill.) Where a person is acting as agent for both vendor and vendee with their knowledge and positive consent, or with such knowledge coupled with proof of facts and circumstances from which consent may be reasonably inferred, the agent is not precluded from recovering commissions from both vendor and vendee.—(1904) *Keach v. Bunn*, 116 Ill. App. 397, judgment affirmed *Bunn v. Keach* (1905) 214 Ill. 259, 73 N. E. 419.

[f] (Mo. 1880) Where the parties to an exchange of real estate employed the same broker, and were brought together by him, and made their own bargain, and each had knowledge that the other was to pay the broker, neither can defend against an action by him for commissions.—*Collins v. Fowler*, 8 Mo. App. 588.

[g] (Mo. 1880) Effect of knowledge of parties. See *Collins v. Fowler*, 8 Mo. App. 588, memorandum.

[h] (Mo. 1885) Whether a real estate broker can recover commissions from both parties to a contract of sale depends on whether both had full knowledge of his double agency, and acquiesced in it.—*De Steiger v. Hollington*, 17 Mo. App. 382.

[i] (Mo. 1904) Where a broker transmitted all orders for sales and purchases given him to a corporation, he receiving a portion of the commission, the broker was not deprived of any right of recovery on such transactions as against the corporation because he was in truth the agent of both parties, his attitude as a broker for his customers and as correspondent of the corporation being known and recognized by both.—*Stripling v. Maguire*, 108 Mo. App. 594, 84 S. W. 164.

[j,k] (N. Y. 1894) A broker is entitled to commissions for procuring an exchange of real estate, though he represented both parties, where it appears that such fact was known to the parties at the time, and that it is a custom among brokers to charge commissions against both parties to an exchange of property.—*Haviland v. Price* (Com. Pl.) 6 Misc. Rep. 372, 26 N. Y. Supp. 757.

[l] (N. Y. 1898) The fact that plaintiffs represented both parties in an exchange of their properties, and expected to receive a commission from both parties, with full notice to the defendant and knowledge by him of such fact, does not constitute a defense to an action against him for commissions earned.—*Whiting v. Saunders*, 22 Misc. Rep. 539, 49 N. Y. Supp. 1016.

[m] (N. Y. 1906) Where a broker was employed by both parties to a contract of exchange of property, neither could refuse compensation, in the absence of express agreement to the contrary, where he had knowledge that the broker, in whom no discretion was left or trust reposed, was also in the employ of the other party.—*Tieck v. McKenna*, 115 App. Div. 701, 101 N. Y. Supp. 317.

[n] (N. C. 1902) In an action by a real estate agent for commissions, objected to on the ground that plaintiff represented both parties, plaintiff testified that defendant told him he would pay him a good commission if he succeeded in making a trade, and that he informed both parties that he would charge them commissions, to be paid equally by them, and that both agreed to pay them. *Held* sufficient, if believed, to justify a recovery.—*Lamb v. Baxter*, 130 N. C. 67, 40 S. E. 850.

(155 Fed. 97.)

MARTIN v. WILSON.

(Circuit Court of Appeals, Second Circuit. June 10, 1907.)

No. 222.

EQUITY—JURISDICTION—ADEQUATE REMEDY AT LAW.

A bill in equity alleged that complainant owned certain stock and bonds of a railroad company; that defendant represented that he had contracted to sell a large amount of the stock and bonds of said company to another company and agreed to pay complainant the same prices he was to receive for his stock and bonds and for those of other holders which he might secure; that a written contract to that effect was entered into between them and carried out, but that such representations were false and fraudulent, in that defendant was to receive, and did receive, larger prices than those stated, the exact amount of which were unknown to complainant. *Held*, that such bill did not state a cause of action cognizable by a federal court of equity, complainant having on the facts alleged a complete and adequate remedy at law by an action to recover damages for the fraud, and the amount actually received by defendant being as readily ascertainable in such an action as in an equity suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 156.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

S. C. Carleton and Wm. J. Harding, for appellant.

Carter, Ledyard & Milburn, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The salient allegations of the bill are as follows: That in July, 1892, the complainant stated to the defendant, who is the sole surviving partner of the firm of R. T. Wilson & Co., that he intended to bring an action, in which the said firm would be defendants, to contest the legality of the issue of certain bonds of the Louisville, New Orleans & Texas Railroad Company. That the defendant thereupon stated and represented to the complainant that he was the president of the said railroad company and that his firm was the owner and holder of a large portion of the capital stock and of certain bonds of the said road and that his firm had agreed with the Illinois Central Railroad Company for the transfer to it of the control of the said Louisville Company. That the firm of R. T. Wilson & Co. further stated that they were desirous of obtaining more bonds and stock of the Louisville Company than they then controlled to enable them to take advantage of their agreement with the Illinois Company and, for the purpose of inducing the complainant to part with his own bonds and stock and to procure the delivery of other like bonds and stock to the said firm, the defendant represented that only by dealing with his firm could complainant obtain more than \$210 for each bond and \$10 for each share of stock owned by him; which statement and representation was false and fraudulent. That thereupon the said firm offered the complainant, if he would refrain from bringing said suit, that they would pay

him for his bonds and stock the same price that they were to receive from the Illinois Company for their own bonds and stock. That they also offered to pay him the difference between the price at which he procured the bonds and stock of third parties to be delivered to them and the price which they were to receive for their own bonds and stock from the Illinois Company—the names of various owners and the amount of their holdings being particularly mentioned. That relying upon these false and fraudulent statements and representations the defendant entered into an agreement with the firm, a memorandum of which was reduced to writing and signed by complainant and said firm.

This agreement states in detail the bonds and stock which are to be sold and delivered and the prices to be paid therefor and, with the exception of a few unimportant formalities, concludes as follows:

"The \$24,000 is all that is to be paid Martin under this agreement, except such profit as Mr. Martin may make on the bonds and stock below 25 cts. for the bonds and 10 cts. for the stock.

"The bonds and stock are to be paid for, to parties bringing them in, from time to time at such prices under 25 cts. and 10 cts. as Martin may designate; and if paid for at less than 25 cts. and 10 cts. the difference is to be paid to him as they are delivered by the parties. It is agreed that not more than 25 cts. shall be paid for the bonds and 10 cts. for the stock, to any parties during the pendency of this agreement, except with the permission of Martin."

The bill alleges further: That, for a valuable consideration, the defendant and his firm warranted that the Illinois Company had agreed to pay the firm for the bonds and stock owned by them \$250 for each bond and \$10 for each share of stock; that relying upon the said representations and warranty the complainant delivered under the contract 1,095 bonds and 4,300 shares of stock and was paid therefor at the contract rate. That the said firm received from the Illinois Company more than they paid complainant for said bonds and stock and profited greatly by reason of their false and fraudulent statements, to an extent unknown to complainant. That complainant first discovered the fraud and the larger amounts received from the Illinois Company in January, 1903.

The complainant offers to return to the firm of R. T. Wilson & Co. whatever bonds and stock may be necessary to put the firm in the position they occupied prior to June 26, 1892. The bill invokes equitable relief because the extent to which the said firm have secretly profited by said transaction is unknown to complainant.

Alternative relief is demanded as follows: First, that a master be appointed to take an account; or, if mistaken in this relief, then, second, that the written contract be reformed so as to agree with the oral contract; or, if mistaken as to the right of the complainant to an accounting or to a reformation of the written contract, then, third, that the contract be rescinded and the defendant be directed to return all of the bonds and shares of stock transferred thereunder. Lastly, the complainant prays, if he be mistaken in all the foregoing prayers, that he may have such other or further relief as to the court may seem just and equitable. The defendant demurs on the ground that the bill shows on its face that the subject-matter of the suit is not within the juris-

diction of a court of equity because the complainant has a plain and adequate remedy at law and is not entitled to the relief prayed for. Confining the allegations of the bill to the facts pleaded and reducing these facts to their last analysis we are convinced that the only cause of action stated is for the recovery of damages based on fraud. That the complainant has a complete and adequate remedy at law we have no doubt and we see no reason for the interposition of a court of equity. There can be no dispute as to what the actual agreement between the parties was because it was reduced to writing, and the reciprocal obligations of the parties are stated in concise and unambiguous language.

In substance R. T. Wilson & Co. agreed to pay the complainant 25 cents on a dollar for the bonds and 10 cents on a dollar for the stock, for all bonds and stock which he brought in, or caused to be brought in, to the firm. The amount due under this contract was fully paid. The accusation against the defendant is that the complainant was induced to enter into the contract by the false and fraudulent statements of the defendant that his firm was to be paid 25 cents and 10 cents, respectively, on the bonds and stock by the Illinois Company and that he would pay complainant the exact sum he received from the Illinois Company. Is it not manifest, if the complainant succeeds in proving the false representations and the averment that more than the contract price was paid by the Illinois Company to the firm of R. T. Wilson & Co., that when he has been paid the difference between what he did receive and what he should have received he will no longer have a cause of complaint against the defendant? It is argued that the amount received from the Illinois Company is unknown and that it is necessary to invoke the powers of a court of equity to compel a discovery in this regard. Assuming for the moment that the difficulty of obtaining testimony affords a reason for turning a complaint in an action at law into a bill in equity, we are unable to see, in the present situation, why there should be any greater difficulty in the one case than in the other. The defendant knows how much he received from the Illinois Company and that company knows how much it paid for the bonds and stock. The books of the company and of the firm undoubtedly contain entries of the transactions. The process of the court will compel the attendance of witnesses and the production of books as effectually in a common-law action as in a suit in equity.

The fact that the bill deals in large figures and states a seemingly complicated transaction tends to obscure the real issue between the parties. Let us test it by a simple illustration, for the principle is the same whether one bond or a thousand bonds are involved. A. agrees to pay \$250 to B. for a bond the face value of which is \$1,000. A. fraudulently represents that he has an agreement with C. by which C. is to pay \$250 for such bonds; that no one else can afford to pay more than \$210 and that if B. will sell he will be given the full benefit of the agreement with C. and receive whatever sum C. pays to A. Relying on this representation B. accepts the offer and the sale is consummated. Subsequently he learns that C. paid A. \$300 for the bond. Is it not too plain for debate that, on these facts, B.'s remedy is an action at law

to recover damages, the measure of which should not exceed the sum of \$50? A court of equity has no jurisdiction of such a controversy.

The decree is affirmed.

TOWNSEND, Circuit Judge, heard the argument, participated in the consultations and voted to affirm.

(155 Fed. 100.)

In re FIRST NAT. BANK OF LOUISVILLE, KY.

FIRST NAT. BANK OF LOUISVILLE, KY., v. HOLT.

(Circuit Court of Appeals, Sixth Circuit. June 17, 1907.)

Nos. 1,654, 1,655.

1. BANKRUPTCY—MODE OF REVIEW—ORDERS MADE IN BANKRUPTCY PROCEEDINGS.

An order made by a court of bankruptcy affirming an order of a referee setting aside an allowance of a secured claim, and requiring the creditor to pay to the trustee the amount of an unlawful preference, is one made in the bankruptcy proceedings proper, and is reviewable on petition for review, under Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432].

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 915.

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

2. SAME—VOIDABLE PREFERENCES—INTENT TO GIVE PREFERENCE.

To render a preferential payment received by a creditor from his debtor within four months prior to the latter's bankruptcy voidable under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1905, p. 689], the bankrupt must not only have been insolvent when the payment was made, but must have intended it as a preference, and, if in fact made in the ordinary course of business, without thought of injuring other creditors and in the belief in his ability to pay them all, the creditor receiving it cannot be charged with reasonable cause to believe that a preference was intended.

3. SAME.

The making of a present loan is a sufficient consideration for a transfer of collateral to secure not only such loan, but also a prior indebtedness, and, where such a transfer was made in good faith when the debtor was solvent, the right of the creditor to the securities attached at that time and collections subsequently made by it thereon and applied on the prior debt after the debtor became insolvent and within four months prior to its bankruptcy do not constitute voidable preferences.

Appeal from the District Court of the United States for the Western District of Kentucky.

Lawrence S. Leopold, for First Nat. Bank.

Herman H. Nettelroth, for trustee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This case comes here by two methods for review—one by petition for review of an order made in the bankruptcy proceedings in Re R. M. Martin Company, and the other by an appeal from the same order in the respect that it is a decree in an

independent controversy arising in the course of a bankruptcy proceeding. The order complained of is one made by the referee and approved by the district judge setting aside an allowance of a secured claim of the First National Bank of Louisville, and requiring it to pay to the trustee \$1,000 which, it was held, the bank had received from the bankrupt through an unlawful preference. The order was therefore one made in the bankruptcy proceedings proper, and not in an independent controversy arising in such proceedings, and is reviewable here upon the petition for review under section 24b of the Act of July 1, 1898 (30 Stat. 553, c. 541 [U. S. Comp. St. 1901, p. 3432]). Accordingly the appeal is dismissed.

The secured claim of the bank was for the sum of \$16,200, which, of course, did not include the \$1,000 in question. The facts as found by the referee and reported to the district judge for review are substantially as follows: In July, 1904, the bankrupt had become indebted to the bank to the amount of \$10,000. It was not secured; and, being in want of more funds to continue its business, the bankrupt entered into an agreement with the bank to which one Johnson, the secretary of the bankrupt, was a third party, and which agreement, after reciting the desire of the bankrupt to procure a loan for use in its business upon the security of its book accounts with its customers and the undertaking of the bank to make such loan, witnessed that:

"Said second party shall execute and deliver to the order of said bank its note of even date herewith, for the amount of such loan and advance, and interest thereon, payable after date thereof, and as security for the payment of said note, said second party hereby sells, assigns and transfers to said bank and its assigns, the following accounts now outstanding upon said second party's books, and all moneys due and to become due thereon."

Here follows a list of accounts, giving names and addresses of debtors and the amounts and dates when due, and a receipt and agreement by Johnson as follows:

"Received of the First National Bank, Louisville, Ky., for collection, sundry, accounts receivable assigned to it by the R. M. Martin Company, Louisville, Ky., as per foregoing list.

"All collections of said accounts to be turned over to said bank as they are received by me.

"Charles L. A. Johnson."

Then the agreement proceeds to stipulate that:

"Said third party agrees, upon request of said bank, to collect the amount of said accounts, or any of them, as the agent of said bank, without any charge against said bank for such collections, and all payments on such accounts shall be entered in said book, and said third party shall immediately pay over and deliver to said bank or its assignees, the amounts of such collections, to be applied to the extinguishment of said note, and all checks, drafts and moneys so collected by said third party shall be and remain the property of said bank until a sufficient amount has been collected, and paid over to pay the total amount of said note and interest, and any other indebtedness of said second party to said bank and after said note and all other indebtedness of said second party to said bank shall have been fully paid and extinguished, the remainder of said accounts, if any, shall revert to, and become the property of said second party.

"In case of the insolvency or bankruptcy of said second party before the payment of said note and interest, or, in the event of any breach of any of the provisions of this contract by either said second party or said third party,

the agency, of said third party for the collection of such accounts shall at once cease and determine, without notice, and said bank shall then proceed to collect the remainder of such accounts so far as possible, and apply the proceeds thereof to the payment of said note and interest, to the payment of any other indebtedness of said second party to said bank, and after deducting the expense of collecting said accounts, shall hold the surplus, if any, subject to the order of said second party or its assigns.

"In witness whereof, the parties hereto have executed this agreement the day and year first above written.

"R. M. Martin Co.,

"By R. M. Martin, President,

"C. L. A. Johnson, Treasurer."

And from time to time thereafter, whenever the bankrupt required more funds, similar loans were made by the bank and upon like security and a like agreement with regard to the accounts of the bankrupt and the application of their proceeds. The particular advances by the bank were paid out of these proceeds and \$4,000 of the old debt of \$10,000 were also paid. Johnson kept an account in his own name with the bank of his deposits made from collections, but without any distinction of the particular accounts from which the deposits came. From time to time these deposits were turned over to the bank by check, the method being, as we understand, first by Johnson's check to the bankrupt and then by the check of the bankrupt to the bank.

During the four months preceding the filing of the petition in bankruptcy loans were made by the bank in this way to the amount of \$16,200. One of these loans was of \$2,000 made December 16, 1905. On the 13th of that month Johnson checked out of his account \$1,000 to the bankrupt, and the bankrupt gave its check to the bank for that amount. The referee states the circumstances as follows:

"It was assumed by the bank that the remainder of the pledged accounts which were still uncollected would suffice to discharge the entire contemporaneously secured indebtedness, and it was then agreed that said Johnson, agent, should pay out of his deposit account the sum of \$1,000 to the R. M. Martin Company, and that the R. M. Martin Company should thereupon pay \$1,000 to said bank upon said old indebtedness aforesaid. The evidence shows that a check was drawn by Johnson, agent, for \$1,000 payable to said bankrupt company. Said check was deposited by said company in its account with said bank, and thereupon said company drew its check against its account in said bank for \$1,000 and thereby paid said sum to said bank, which gave credit upon said old debt therefor."

The referee further states that the evidence shows "that on and after December 1, 1905, the R. M. Martin Company was insolvent," and "that the officers of said bank had reasonable cause to believe that said company was then insolvent." From the facts that the evidence did not show whether the \$1,000 paid by Johnson on December 13, 1905, was collected from accounts pledged after December 1, 1905, or whether it was realized from accounts pledged before that date, and that Johnson had so commingled his collections that separation of the proceeds was rendered impossible, the referee concluded that the presumption should be that the payment was made from the proceeds of the newly assigned accounts, upon the principle applied to the willful commingling of goods. We find nothing in the case as stated by the referee which would justify the application of such a rule. There is no reason for supposing that the commingling of the col-

lections was in disregard of the agreement of the parties or was made with any wrongful intention. It was not reasonable to charge the parties with knowledge that bankruptcy was impending or that some other condition was likely to arise in which it would be necessary to have so careful a record. But we shall not pursue this subject further, because of the graver error into which the referee fell. Nor do we need to settle the rights of the parties upon the footing of mutual credits between banks and their customers. The facts found did not justify the conclusion that there was any preference which was voidable by the trustee, even if it should be found that the payment of the \$1,000 operated in the circumstances to effect a preference, as the referee thought it did.

The question whether this was a voidable preference which must be surrendered before the bank can be permitted to prove its claim depends upon the construction and effect of section 57g of the act. Before the amendment of that subdivision and of section 60a and section 60b, there was ground for holding that section 57g made voidable all preferences which were declared such by section 60a. Before the amendment section 57g was not restricted, and so was open to the inference of a wide reference to section 60a for a complement, and that the two provisions by their association would render any payment or transfer a voidable preference which if made in the circumstances mentioned in section 60a, would enable the particular creditor to obtain an advantage over other creditors of the same class. This was so held in *Pirie v. Chicago T. & T. Co.*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, in a cause which arose prior to the amendment. But upon a recognition of the embarrassments which business men might suffer upon that rule of law in the collection of their debts, Congress in 1903, passed the amendment. And the amendment of section 57g makes only those preferences voidable which are made so by section 60b, or by 67e, which latter refers only to conveyances made with intent to defraud creditors or rendered invalid by some statute of the state; and that reference need not be further noticed. Section 60b, thus referred to, makes transfers voidable by the trustee when the creditor has reasonable cause to believe that the debtor intends thereby to create a preference. The nearest approach toward this requirement here is that for two weeks the debtor had been insolvent, and the officers of the bank had reasonable cause to believe the company was insolvent. A man is insolvent, as that term is defined by the fifteenth subdivision of section 1 of the act, whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts. But, to make the reception of payment a preference, the creditor must have had reasonable cause to believe that the debtor was intending to give him a preference over other creditors, and we incline to think, with the Circuit Court of Appeals for the First Circuit (*Hardy v. Gray*, 144 Fed. 922, 925, 75 C. C. A. 562), that the reasonable implication of the language is that the debtor himself must have intended the preference. The very word signifies the doing of a thing with a purpose to give

an advantage; and the construction which treats the motive of the debtor as indifferent seems artificial and awkward. But it is enough to say that a belief that a debtor is insolvent is a very different thing from a belief that he intends a preference; for it would often, and probably generally, happen that a person, though in fact insolvent, would while continuing his business in the usual way make payments without a thought of disparagement of other creditors and with confidence in his ability to pay them all. And upon like considerations the creditor may share in the confidence of his debtor, and may well suppose that the debtor while paying him his debt in the common course of business is acting without any purpose of giving special favor. Such considerations have often been adverted to by the courts as the basis of decision, and were the principal motive for the amendment of 1903. *Grant v. National Bank*, 97 U. S. 80, 24 L. Ed. 971; *Stucky v. Masonic Savings Bank*, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640; *In re Eggert*, 102 Fed. 735, 43 C. C. A. 1; *Off v. Hakes*, 142 Fed. 364, 73 C. C. A. 464; *Hardy v. Gray*, 144 Fed. 922, 75 C. C. A. 562; *J. W. Butler Paper Co. v. Geombel*, 143 Fed. 295, 74 C. C. A. 433; *Loveland on Bank*. (3d Ed.) § 194c.

Moreover, this appropriation of the \$1,000 was made pursuant to a stipulation entered into at the time when the last previous loan and assignment of accounts was made. That stipulation was that the assigned accounts should stand as security for the payment of the earlier debt, as well as for the loan then made. The making of that loan was a valid consideration for the assignment of the accounts as security for a pre-existing debt. *Peters v. Merchants' & Farmers' Bank, etc.*, 149 Fed. 373, 79 C. C. A. 193; *Jones on Pledges*, § 361 (2d Ed.); 1 *Brandt on Suretyship and Guaranty* (3d Ed.) § 26, and note 16; *Johnston v. Nichols*, 1 Com. B. 250; *Boyd v. Moyle*, 2 Com. B. 644; *Burgess v. Eve*, L. R. 13 Eq. 450; *Morrell v. Cowan*, L. R. 7 Ch. Div. 151; *Leask v. Scott*, L. R. 2 Ch. Div. 376; *Sitgreaves v. Farmers' & Mechanics' Bank*, 49 Pa. St. 359; *Buchanan v. International Bank*, 78 Ill. 500.

The assignment was an executed agreement, and was not an agreement to be subsequently performed. No facts are found by the referee which impeach the good faith of the assignment. There is no finding that at the time it was made the Martin Company was in contemplation of bankruptcy or was then insolvent. That being so, the right of the bank attached when the agreement was made and would not be displaced by the subsequent bankruptcy of the assignor.

The order complained of in the petition for review must be reversed, with costs, and the original order allowing the complainant's claim as a secured claim will be restored.

(155 Fed. 273.)

HOPPER v. DENVER & R. G. R. CO.*

(Circuit Court of Appeals, Eighth Circuit. May 24, 1907.)

No. 2,414.

1. DEATH—STATUTES—CONSTRUCTION.

Mills' Ann. St. Colo. § 1508, creates an action for death negligently caused by a public carrier, and declares that it shall forfeit for every person and passenger so injured or killed not more than \$5,000, nor less than \$3,000, which may be sued for and recovered: (1) By the husband or wife of deceased; or (2) if there be no husband or wife, or he or she fail to sue within a year after such death, then by the heir or heirs of the deceased, or, if the deceased be a "minor or unmarried," then by the father and mother, or, if either of them be dead, then by the survivor. *Held* that, if the deceased left a husband or wife, the sole right of action was in such survivor, save that as against children the right would be lost unless asserted within a year; if there was no surviving husband or wife, or the survivor failed to sue within a year, then the sole right would be in the children; and if there was neither surviving husband nor wife nor any children, then only would the right of action be in the father and mother, or the survivor; so that where an unmarried adult female is killed by the negligence of a carrier, and she leaves neither husband, child, nor mother, the right of action is in her surviving father.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, §§ 35-46.]

2. SAME—PECUNIARY INJURY.

When decedent, an unmarried female 19 years of age at the time of her death, was two years old, her mother died, and she was taken by plaintiff, her father, to reside with her aunt, with whom she lived until she was 16, when she was sent by him to school to fit herself for teaching. She was sympathetic, ambitious, industrious, of good health, and fond of her father, who paid the expenses incident to her education, and desired to keep house for him, but he, being a farm laborer and traveling machinist, had not married again, and at the time of his daughter's death was 60 years of age. *Held*, that evidence of these facts, in the light of the natural influence or promptings of filial ties, was sufficient to sustain a finding that there was a reasonable expectation of substantial, though not large, pecuniary benefit to the father from a continuance of the life of the daughter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 20.]

3. CARRIERS—INJURY TO PASSENGERS—DEATH—NEGLIGENCE—PRESUMPTION.

In an action for death of a passenger by the alleged negligence of a carrier's servants, evidence that plaintiff was a passenger, and that her death resulted from an accident to the train, was sufficient to establish a prima facie case of the carrier's negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1307-1314.]

In Error to the Circuit Court of the United States for the District of Colorado.

James H. Teller (J. H. McCorkle, on the brief), for plaintiff in error.
Henry A. Dubbs (Thomas H. Devine, J. W. Preston, Joel F. Vaile, C. W. Waterman, and E. N. Clark, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

VAN DEVANTER, Circuit Judge. This was an action under a statute of Colorado by a father to recover damages of a railroad company for the death of his daughter, alleged to have been caused by

*Rehearing denied September 30, 1907.

the negligence of the company while she was a passenger upon one of its trains. At the conclusion of the plaintiff's case in chief, the court upon the defendant's motion, directed a verdict in its favor, and we are now called upon to consider whether or not that ruling was right.

The statute of the state under which the right of action was asserted is as follows (Gen. St. 1877, §§ 877-879; Mills' Ann. St. §§ 1508-1510):

"Sec. 1508. Whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employé, whilst running, conducting or managing any locomotive, car or train of cars, or of any driver of any coach or other public conveyance whilst in charge of the same as a driver, and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car, or in any stage coach, or other public conveyance, the corporation, individual or individuals in whose employ any such officer, agent, servant, employé, master, pilot, engineer or driver shall be at the time such injury is committed, or who owns any such railroad, locomotive, car, stage coach or other public conveyance at the time any such injury is received, and resulting from or occasioned by defect or insufficiency above described, shall forfeit and pay for every person and passenger so injured the sum of not exceeding five thousand (5,000) dollars, and not less than three thousand (3,000) dollars, which may be sued for and recovered:

"First—By the husband or wife of deceased, or

"Second—If there be no husband or wife, or he or she fails to sue within one year after such death, then by the heir or heirs of the deceased, or

"Third—If such deceased be a minor or unmarried, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or if either of them be dead, then by the survivor. In suits instituted under this section it shall be competent for the defendant for his defense to show that the defect or insufficiency named in this section was not a negligent defect or insufficiency.

"Sec. 1509. Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the party injured.

"Sec. 1510. All damages accruing under the last preceding section shall be sued for and recovered by the same parties and in the same manner as provided in the first section of this act, and in every such action the jury may give such damages as they may deem fair and just, not exceeding five thousand (5,000) [dollars], with reference to the necessary injury resulting from such death, to the surviving parties, who may be entitled to sue; and also having regard to the mitigating or aggravating circumstances attending any such wrongful act, neglect or default."

The words "heir or heirs," in the second subdivision of section 1508, mean child or children, that is, lineal descendants (*Hindry v. Holt*, 24 Colo. 464, 51 Pac. 1002, 39 L. R. A. 351, 65 Am. St. Rep. 235); and, though some of the printed statutes of the state make the words "father and mother" in the next subdivision read "father or mother," the first reading is correct (*Pierce v. Conners*, 20 Colo. 178, 183, 37 Pac. 721, 46 Am. St. Rep. 279).

The evidence disclosed that the deceased was 19 years old, and so was an adult under the laws of Colorado (3 Mills' Ann. St. Rev. Supp.

§ 4699) ; that she was unmarried ; and that she left surviving her a father, the plaintiff, but no husband, child, or mother. If, therefore, her death was otherwise one for which the defendant was required to respond in damages, the third subdivision of section 1508, if read literally, gave the father a right of action ; but the Circuit Court, being of opinion that the words "minor or unmarried" in that subdivision must be read "minor and unmarried," held that no right of action was given for the death of an adult leaving no surviving spouse or child ; and this was one of the reasons assigned for directing a verdict for the defendant.

As no right to recover damages resulting from death was recognized by the common law, the father's right in this instance, if he had any, must arise entirely from the state statute. *Hindry v. Holt*, 24 Colo. 464, 51 Pac. 1002, 39 L. R. A. 351, 65 Am. St. Rep. 235 ; *Swift v. Johnson*, 71 C. C. A. 619, 138 Fed. 867, 1 L. R. A. (N. S.) 1161. As written, it plainly confers such a right upon him, for not only does it, by the use of the terms "any person," "any passenger," "every person and passenger," and "every such case," manifest a purpose to cover every instance of death caused in the manner specified, and not within the qualification expressed in *Atchison, etc., Co. v. Farrow*, 6 Colo. 498, whether the deceased be a minor or an adult, married or unmarried, but it in terms gives the right of recovery to the father where, as here, he is the only surviving parent, and the deceased leaves no surviving spouse or child. Thus far there is no conflict, nor any difficulty in applying the statute. But it is said that conflict and difficulty are encountered when the third subdivision of section 1508, respecting the right of the parents, and the two preceding subdivisions, respecting the rights of the surviving husband or wife and the children, are read together, because a minor may die leaving a husband or wife and also parents ; and it could have been added that an unmarried person may die leaving children and also parents, as in the case of a widower, widow, or the mother of illegitimate children. See *In re Kaufman*, 131 N. Y. 620, 30 N. E. 242, 15 L. R. A. 292 ; *Mills' Ann. St.* §§ 127, 1533 ; *Mills' Ann. St. Rev. Supp.* § 4658 ; *Marshall v. Wabash Ry. Co.*, 120 Mo. 275, 25 S. W. 179. All of this is undoubtedly true. And it is equally true that, if each subdivision is read literally, they will in the instances supposed give conflicting rights of action to the surviving spouse and to the parents, or to the children and to the parents, as the case may be, when the statute as a whole makes it plain that there shall be but one right of action and but one recovery in respect of any death ; that the right of recovery shall be in the surviving spouse, if there be one, and, if not, then in the children, if there be any ; and that it shall be in the parents only where there is neither surviving spouse nor child. To obviate the conflict and difficulty thus presented, the Circuit Court construed the words "minor or unmarried" to mean "minor and unmarried," and this construction is now earnestly pressed upon us by counsel for the defendant. But we cannot give it our approval. It does not entirely avoid the conflict and difficulty which make resort to interpretation necessary, and does not give effect to the controlling purpose and spirit

of the statute otherwise made manifest. If it were adopted, these subdivisions would still give conflicting rights of action for the death of one who, although a minor and unmarried, dies leaving children and also parents, as may be the case with a minor who is a widower, widow, or the mother of illegitimate children; and, as held by the Circuit Court, it would defeat a right of action for the death of an adult leaving parents, but no surviving spouse or child, although such a case, as before stated, is within the terms of the statute as written, and also within its purpose and spirit.

But there is another construction, which, while neither excluding any case within the terms used, nor including any not within them, harmonizes the three subdivisions, avoids all the difficulties suggested, and gives full effect to the purpose and spirit of the statute as a whole. The subdivisions are evidently intended to take rank and have effect in the order in which they occur, and their true meaning, as we think, may be stated in this way: If the deceased leave a husband or wife, the sole right of action will be in such survivor, save that, as against children, the right will be lost unless asserted by suit within one year; but if there be no surviving husband or wife, or the survivor fail to sue within one year, then the sole right of action will be in the children; and if there be no surviving husband or wife, nor any child, then, and then only, will the right of action be in the father and mother, or the survivor of them. The first subdivision does not make the right of the husband or wife dependent upon the majority of the deceased, nor does the second make the right of the children dependent upon his majority or upon his being married at the time of his death; and as the third is evidently designed to take rank and have effect in subordination to the other two, we think it should be interpreted as if it read: "If such deceased be a minor or unmarried, and leave no surviving husband or wife and no surviving child, then by the father and mother." In no other way can the three subdivisions be completely harmonized without violating the sense of the statute as a whole. And no little support is given to this construction by the decisions of the appellate courts of the state, covering a period of several years, in which, without discussion of the question, the statute is treated as giving the parents a right of action for the death of an adult child leaving no surviving spouse or child. *Denver, etc., Co. v. Wilson*, 12 Colo. 20, 20 Pac. 340; *Hindry v. Holt*, 24 Colo. 464, 468, 51 Pac. 1002, 39 L. R. A. 351, 65 Am. St. Rep. 235; *Mitchell v. Elevator Co.*, 12 Colo. App. 277, 55 Pac. 736.

The statute was largely copied from one in Missouri, which read "minor and unmarried," and this is advanced as a reason for reading the Colorado statute in the same way; but we think it is a sufficient answer to say that, in adopting the statute, the Colorado Legislature not only changed the word "and" to "or," but otherwise modified the language used, and must have intended to give effect to whatever change of meaning naturally resulted therefrom. *Crawford v. Burke*, 195 U. S. 176, 190, 25 Sup. Ct. 9, 49 L. Ed. 147. One of the other changes is particularly significant. The Missouri statute limited the right of recovery under the second subdivision to the minor

children, and so gave an adult no right in respect of the death of a parent. But the Colorado Legislature, before adopting the statute, changed this subdivision so that it would embrace all children, whether minors or adults; and while this was being done it was not unnatural that the next subdivision should also be changed, as we think it was, so that the parents would have the same right to recover for the death of an adult child as for the death of a minor, that is, wherever there is no preferred beneficiary under the two preceding subdivisions.

We conclude that the Circuit Court erred in its interpretation of the statute.

Another reason assigned by the Circuit Court for directing a verdict for the defendant was that there was no evidence of any pecuniary injury to the plaintiff from the death of the daughter. In substance, the evidence was as follows: When the deceased was two years old, her mother died at the family home in Texas, and shortly thereafter the child was taken by the father to an aunt near Greenfield, Mo., with whom she lived until she was 16. He then sent her to a school at Parkville, Mo., that she might prepare herself for teaching, and he paid the expenses incident thereto. She had been in this school three years and was on a visit to a sister in Colorado when she met her death. She was sympathetic, ambitious, industrious, of good health, fond of her father, and wanted to keep house for him, but had not as yet rendered any service to him or made any contribution to his support. After the mother died, the father continued to reside in Texas, but broke up housekeeping. He was chiefly engaged as a traveling machinist, and sometimes as a farm laborer; his earnings being about \$50 per month. He had not married again, and was 60 years old. Considering this evidence in the light of the natural influence or prompting of filial ties, we think it would have sustained a finding that there was a reasonable expectation of substantial, though not large, pecuniary benefit to the father from a continuance of the life of the daughter. *Pierce v. Conners*, 20 Colo. 178, 182, 37 Pac. 721, 46 Am. St. Rep. 279; *Gibson, etc., Co. v. Sharp*, 5 Colo. App. 321, 327, 38 Pac. 850; *Swift & Co. v. Johnson*, 71 C. C. A. 619, 138 Fed. 867.

It may be that in the further progress of the case it will become necessary to consider whether the provision in section 1508 for a minimum recovery of \$3,000, irrespective of actual pecuniary injury, is valid, and, if so, whether that section is thereby made penal in the sense that it may be enforced only in the courts of Colorado (see *Philpott v. Missouri Pac. Ry. Co.*, 85 Mo. 164; *Carroll v. Missouri Pac. Ry. Co.*, 88 Mo. 239, 246, 57 Am. Rep. 382; *Marshall v. Wabash R. Co.* [C. C.] 46 Fed. 269; *Dale v. Atchison, etc., Co.*, 57 Kan. 601, 47 Pac. 521; *Matheson v. Kansas City, etc., Co.*, 61 Kan. 667, 60 Pac. 747; *Adams v. Railroad Co.*, 67 Vt. 76, 30 Atl. 687, 48 Am. St. Rep. 800; *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; *Stewart v. Baltimore & Ohio R. R. Co.*, 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537; *Brady v. Daly*, 175 U. S. 148, 25 Sup. Ct. 62, 44 L. Ed. 109; *Boston & Maine R. R. Co. v. Hurd*, 47 C. C. A. 615, 108 Fed. 116, 56 L. R. A. 193; s. c. 184 U. S. 700, 22 Sup. Ct. 939, 46 L. Ed. 765; *McCabe v. American Woolen Co.* [C. C.] 124 Fed. 283; s. c. 65 C.

C. A. 59, 132 Fed. 1006; *Malloy v. American Hide & Leather Co.* [C. C.] 148 Fed. 482; *Wharton's Conflict of Laws* [3d Ed.] §§ 4b, 480a; *Atlanta v. Chattanooga Foundry*, 61 C. C. A. 387, 392, 127 Fed. 23, 28, 64 L. R. A. 721; s. c. 203 U. S. 390, 397, 27 Sup. Ct. 65, 51 L. Ed. 241; *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 17, 25 Sup. Ct. 158, 49 L. Ed. 363); but the attitude in which the case is presented to us in such that we do not deem the present consideration of these matters necessary or wise.

Some question was raised in argument respecting the sufficiency of the evidence of negligence on the part of the defendant, but this need not be noticed further than to say that the evidence, without exculpating the defendant, and without any suggestion of fault on the part of the deceased, disclosed that her death was caused by an accident to the train on which she was a passenger, and so the case was brought within the rule announced by the Supreme Court in *Gleeson v. Virginia Midland R. R. Co.*, 140 U. S. 435, 443, 444, 11 Sup. Ct. 859, 35 L. Ed. 458:

"That the happening of an injurious accident is in passenger cases prima facie evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care) the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight. * * * The law is that the plaintiff must show negligence in the defendant. This is done prima facie by showing, if the plaintiff be a passenger, that the accident occurred."

See, also, *Wall v. Livezey*, 6 Colo. 465; *Sanderson v. Frazier*, 8 Colo. 79, 5 Pac. 632, 54 Am. Rep. 544; *Denver & Rio Grande R. R. Co. v. Fotheringham*, 17 Colo. App. 410, 68 Pac. 978.

For the error in directing a verdict for the defendant, the judgment is reversed, with a direction to grant a new trial.

(155 Fed. 513.)

CLARK v. LYSTER.

(Circuit Court of Appeals, Eighth Circuit. April 27, 1907.)

No. 2,458.

1. PARTNERSHIP—PARTNERSHIP PROPERTY—REAL ESTATE USED IN BUSINESS.

Real estate not purchased with partnership funds does not become partnership property, though used for partnership purposes, unless there is some agreement that it shall be so considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, §§ 101-108.]

2. MORTGAGES—MORTGAGEABLE INTEREST—ELIGIBILITY TO RECORD.

Two partners in a manufacturing business who owned the real estate used therein as equal tenants in common entered into a contract by which one retired from active participation in the business but remained as a silent partner for a term of five years, leaving the most of his capital invested. He also conveyed to his partner his half interest in the real estate "as a basis of credit," but took a bond for its reconveyance absolutely and unconditionally at the end of the term without subjecting it, as between the parties, to the risks of the business. After the expiration of the term, when he had become entitled to a reconveyance but had not received it, he executed a mortgage on his interest in the real estate to secure a valid indebtedness. *Held*, that such real estate was not property of the partnership but of the individual partners; that the mortgagor was the equitable owner of a half interest therein which was mortgageable as real estate, and that the mortgage given was valid, no rights of partnership creditors having intervened, and was entitled to record under Gen. St. Kan. 1901, § 1221, if not as a technical mortgage, as "an instrument in writing" affecting real estate, which record was constructive notice to all subsequent purchasers of its contents.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 10, 11, 201.]

3. ESTOPPEL—EQUITABLE ESTOPPEL—ACTS CREATING.

In a suit to foreclose a mortgage, given to complainant by his son, against a grantee of the property, it appeared that defendant and the mortgagor were partners in a manufacturing business, and owners as tenants in common of the real estate used in the business. They entered into a contract by which the mortgagor retired as an active partner, but remained for a term of five years as a silent partner, leaving the most of his capital in the business, and also making defendant a loan to be used in the business and accounted for subject to its risks. He also conveyed his interest in the real estate to defendant "as a basis of credit," but took a bond for its reconveyance at the end of the partnership term. About that time he and defendant became involved in litigation respecting the latter's accounting under the partnership agreement, which did not, however, involve or affect the real estate. Pending such litigation, and after he had become entitled to a reconveyance of the real estate but had not received it, he executed the mortgage in suit to complainant, covering his interest in such real estate, to secure a valid indebtedness, which mortgage was duly recorded. Subsequently a settlement of the litigation was effected between the parties by which defendant paid the mortgagor a sum of money in full of his interest in the business and the loan and received a quitclaim deed to the mortgagor's interest in the real estate. Nothing was said in regard to the mortgage, and defendant had no actual knowledge of it. Complainant, who resided in another state, hearing of the pending settlement, visited his son, and, on completion of the settlement, received part payment of the mortgage debt from the proceeds, a portion of which he gave to his son to be invested for the benefit of his family. It was in dispute whether he arrived before or after the completion of the

settlement, but in any event he took no part therein. *Held*, that there was nothing in such facts or in complainant's conduct which created an equitable estoppel to prevent him from enforcing his mortgage against the property for the balance due him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 165-187.]

Appeal from the Circuit Court of the United States for the District of Kansas.

This was a bill in equity to foreclose a mortgage given April 27, 1901, by Herbert H. Clark and his wife to Harvey S. Clark, his father, conveying an undivided one-half interest in certain real estate situated in Wilson county, Kan., to secure the payment of certain notes amounting to \$35,000 described in the mortgage, upon which \$19,500 remained unpaid when the suit was brought. This mortgage was duly recorded in the office of the register of deeds of Wilson county on April 29, 1901. The mortgagors and also one Frederick E. Lyster, who held the title to the mortgaged premises at the time the suit was brought, were originally made defendants. Subsequently the suit was dismissed as to the Clarks and prosecuted only against defendant Lyster. His answer admits the execution of the mortgage as charged, but avers that at the time it was given Clark, the mortgagor, had no mortgageable interest in the land conveyed, that the notes claimed to have been secured by the mortgage had all been paid and satisfied, and that the mortgagee by reason of certain facts was estopped in equity from enforcing his security. The main facts, as disclosed by the pleadings, proof, and proceedings below, are as follows: Defendant Lyster and Herbert Clark, the mortgagor, had prior to April 27, 1895, been copartners in the manufacture of linseed oil, and were then the owners in fee simple, as tenants in common, each of an undivided one-half interest in the real estate which had been used by them in connection with their manufacturing business, the one-half of which belonging to Clark constituted the land which he subsequently mortgaged to his father. Their partnership was on that day dissolved, and a new agreement entered into by which Clark was to retire from active participation in the business, but to retain as a silent partner for a term of five years thereafter his interest in it. He agreed to leave his portion of the partnership capital, except \$5,000, in the business, to loan Lyster \$25,000 for five years, to pay annually to Lyster \$2,500 in lieu of rendering personal services in carrying on the business, and in order to afford Lyster a basis of credit and commercial standing he agreed to convey and did convey to Lyster by a quitclaim deed his one-half undivided interest in the mill property, taking from Lyster a bond for a deed to reconvey the same to him on September 1, 1900. They proceeded with the business under the new agreement until about the expiration of the term, when Clark brought his action against Lyster to wind up their partnership business and for an accounting of all moneys due to him from Lyster under the agreement of April 27, 1895. On March 1, 1902, while that action was pending, Clark and Lyster settled and compromised all their differences involved in the suit. Lyster paid Clark \$40,000 in full of all his dues, whether for money loaned or profits made. Clark dismissed his suit, and agreed to and did convey by a quitclaim deed his one-half equitable interest in the mill property which he had on April 27, 1901, mortgaged to his father and for which he then held Lyster's bond for a deed. At the time of that settlement Lyster had no actual or distinguished from constructive knowledge of the existence of the mortgage sued on, or of the fact that Clark's father had any right or interest in the property, and believed he was acquiring from Clark an unincumbered title to the same. After Clark received the \$40,000 from Lyster pursuant to the terms of the settlement, he paid more than \$16,000 of it over to his father in partial satisfaction of the mortgage debt, and the latter, being then 79 years old, made a present to his son of \$10,000 to be invested for the support of his family. Lyster, after making his settlement with Clark on March 2, 1902, under the belief that he was the owner of an unincumbered title to the land in question, erected thereon permanent improvements of the value of \$20,000, and was not actually informed of complainant's claim until this suit was be-

gun, July 10, 1902. The court below by consent of parties appointed a special master to take testimony and return the same, with his findings of fact based thereon, to the court. The master heard the proof, made a finding of the foregoing main facts, and also found (using his language) that: "Close confidential relations existed at all times between Harvey S. Clark and Herbert H. Clark; the father was generous to the son, and to a considerable extent was dominated by the son. The settlement was brought to a close after Harvey S. Clark had come to Kansas City in order to be present when the settlement was made, and at a time when Harvey S. Clark was dwelling with his son Herbert H. Clark. Of the proceeds of said settlement Harvey S. Clark presented Herbert H. Clark with about \$10,000 to invest for the latter's family, although Herbert H. Clark was then still indebted to Harvey S. Clark in the sum of nearly \$20,000. From these facts, as well as from the contradictory evidence which Harvey S. Clark gave and the lack of interest which he manifested while testifying, I find that Harvey S. Clark authorized the settlement which was made by Herbert H. Clark with Lyster, and that the attempt to foreclose the written instrument described in the bill of complaint is an afterthought conceived by Herbert H. Clark, who overpersuaded his father to undertake it." He also specially found that "neither during the negotiations for settlement nor at the time of the settlement and payment of the \$40,000 was anything said one way or the other by any of the parties engaged therein concerning the said mortgage," and that Clark, in consideration of the receipt of \$40,000 from Lyster, agreed to and did accept the same in full settlement and satisfaction of the indebtedness due him from Lyster, which he found to be \$38,279.45, and agreed "to make, execute and deliver to said Lyster at the time said \$40,000 is paid a good and sufficient quitclaim deed of conveyance of all of his right, title and interest in and to" the property which was mortgaged. He also specially found that the issue involved in the accounting suit between Clark and Lyster "did not embrace or involve or include any questions pertaining to the real estate or the reconveyance thereof or other matters provided for in the bond of date April 27, 1895, but only as to the moneys loaned and left in the business by the said Herbert H. Clark and the earnings of the business." The master reported in favor of a dismissal of the bill on the ground that it would be unjust and inequitable to defendant Lyster to have the mortgage enforced. The Circuit Court overruled exceptions duly filed to the master's report, confirmed the same, and entered a decree dismissing the bill. From that decree an appeal is prosecuted to this court.

Thomas J. White and W. Littlefield (A. N. Gossett, on the brief), for appellant.

Charles W. Webster (John P. Gilmer and J. W. Crowley, on the brief), for appellee.

Before SANBORN and ADAMS, Circuit Judges.

ADAMS, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Notwithstanding the fact that Harvey S. Clark, the mortgagee, has died since the institution of this suit and his personal representative has been substituted in his place, we shall frequently refer to the parties as they originally appeared. The substantial facts of the case are, as observed by the learned trial judge, practically undisputed, and we are to determine and adjudicate the rights of the parties thereunder. There is no doubt about the bona fides of the transactions between Harvey S. Clark, the mortgagee, and his son Herbert, which resulted in an indebtedness of the latter to the former in the amount of \$35,000, the giving of the notes to represent the indebtedness, the execution of the mortgage to secure their payment, or the actual pur-

pose of the parties to pledge whatever interest the son had in the real estate mortgaged to secure the payment of his indebtedness to his father. It is conceded that the son had paid the entire indebtedness excepting \$19,500, and that the latter amount constituted a bona fide debt due on one of the notes described in the mortgage from the son to the father at the time this suit was brought. Notwithstanding the fact that numerous assignments of error are made, it is clear, as treated by the trial court, that two controlling questions are decisive of the case: First. Was the son's interest in the land which was conveyed by the mortgage subject to alienation as land, so as to entitle the mortgage deed to be recorded in the land records of the county and render its record constructive notice to subsequent purchasers? Second. Was the mortgagee's conduct in receiving from his son, the mortgage debtor, a part of the proceeds of the settlement between him and Lyster and otherwise, such as estops him in equity from foreclosing his mortgage for the balance due him? These questions will be considered in their order.

To properly apply the law, an accurate understanding of the relation of the parties as between themselves and as to creditors should be first stated. As between the mortgagor, Herbert Clark, and Lyster, the former undoubtedly owned the land in question and had a recognized vendible interest in it in 1895. The contract and bond for a deed executed by Lyster to Herbert on April 27, 1895, recited that Clark was then "the owner in fee simple of an undivided one-half interest" in the premises, and he then conveyed the same to Lyster for the purpose, as stated in the contract, of giving him credit and commercial standing as the managing partner of the partnership then formed between them. The contract and bond clearly disclose that as between the parties, so far as their rights against each other were concerned, the undivided interest conveyed by Clark to Lyster was not to be treated as partnership property, or as such made subject to any demands of Lyster against Clark on any possible accounting which might accrue to him. The contract and bond carefully discriminated between the loan of \$25,000 made by Clark to Lyster and the conveyance of Clark's undivided interest in the land to Lyster. It subjected the loan to all the chances and hazards of the business. It provided that "on the first day of September, 1900, he" (Lyster) "will pay to said second party" (Clark) "the sum of \$25,000 so loaned to him, conditioned, however, that in case of loss of any part of said loan by the first party in the legitimate transaction of the business herein provided for, then one-half of said amounts so lost beyond the control of said first party" (Lyster) "shall be deducted from said loan and the remainder of said amount" (\$25,000) "shall be considered the amount due from the party of the first part to the party of the second part," etc. On the other hand, the contract and bond subjected the undivided interest transferred by Clark to Lyster to none of the chances and hazards of the business. It contemplated and in terms provided that it should be conveyed to Lyster and employed by him "as a basis of credit and commercial standing for the advantage and upbuilding of the business"; it contained an express covenant in the form of a bond that the interest should be reconveyed by Lyster to Clark on Septem-

ber 1, 1900, and, in the same clause which subjected the money to the chances and hazards of the business, it provided, concerning the land conveyed by Clark, as follows:

"That at the expiration of the five years for which this contract runs he" (Lyster) "will reconvey the premises herein described as hereinbefore provided" (referring to the absolute and unconditional terms of the bond) "to the said second party, his heirs or assigns, inevitable wear, decay, loss by fire or otherwise excepted."

From these provisions of the contract it appears that according to the intent, purpose, and agreement of the parties the land was not to become partnership assets, but was to remain the individual property of Clark and be reconveyed to him absolutely and unconditionally on a day fixed, without regard to any liability which might then exist in favor of Lyster against Clark arising out of the partnership business. Whether and how far real property is partnership assets depends upon the intention or agreement of the parties. 1 Jones on Mortgages, § 119; Brown v. Morrill, 45 Minn. 483, 48 N. W. 328; Collumb v. Read, 24 N. Y. 505.

American and English cases very generally hold that real estate not purchased with partnership funds does not become partnership property, though used for partnership purposes, unless there is some agreement that it shall be so considered. Story on Partnership (7th Ed.) §§ 94 and 95, note B, and cases cited. A mere agreement to use real property for partnership purposes is not sufficient to convert it into partnership stock. There must be some evidence of further agreement to make it partnership property. 1 Lindley on Partnership (2d Am. Ed.) p. 332 et seq., and cases cited; Shafer's Appeal, 106 Pa. 49; Alexander v. Kimbro, 49 Miss. 529; Ware v. Owens, 42 Ala. 212, 94 Am. Dec. 672.

In Frink v. Branch, 16 Conn. 260, 269, facts were considered very similar to those in this case, and it was there held that the property was not partnership assets; the court saying:

"This property was not purchased with common funds, nor was any common capital withdrawn from the power of creditors to make the purchase, nor was there any agreement that the property thus owned in common should become partnership stock or constitute any part of the capital of the company. It was agreed, by parol only, that this property should be improved by the company in the prosecution of its business; but this agreement extended only to its temporary use. It did not, nor could it, affect the title to the land, even as between the parties, much less as the rights of others might be involved."

In Reynolds v. Ruckman, 35 Mich. 80, which was a suit for the foreclosure of a mortgage given by one of two partners who held an undivided one-half interest as tenant in common with his copartner in property made use of for partnership purposes, the defense set up was that it was partnership assets. Chief Justice Cooley, in delivering the opinion of the court, said that cases "in which the lands have been purchased with partnership funds can have no application here. * * * Real estate held by partners may or may not be partnership property; but usually it is not so unless partnership assets have been used to purchase it, or unless it was put in originally as a part

of the joint estate. But generally the fact that two or more persons make use of property in which their interests are apparently several, for partnership purposes, is very far from indicating an understanding that it is partnership estate."

Before the time arrived for the execution of the deed from Lyster to Clark, pursuant to the terms of the contract and bond, they became estranged; litigation ensued, and Clark brought his action against Lyster for an accounting concerning the partnership business. According to the proof and to the finding of the special master, that suit involved no question concerning the real estate or the reconveyance thereof by Lyster, but related exclusively to an accounting for the money loaned and left in the business by Clark and the earnings of the business. No creditors of the firm appeared or intervened in that suit, and, so far as this record discloses, there were no creditors of the firm at the time that suit was settled in March, 1902. There were none in April, 1901, when Clark executed his mortgage to his father, and no questions are now involved in this suit which in any manner concern creditors. So that for the purpose of this case we are dealing with no assets in which creditors or any other persons except Clark and Lyster and the mortgagee of Clark have any rights. In this condition of things the learned trial judge held that on April 27, 1901, when the mortgage was given by Clark, he had no interest in the land which he could mortgage, but had only an equitable right to an accounting; that the mortgage in question amounted only to an assignment of Clark's right as a partner to enforce an accounting; and cited as sustaining his conclusion the following cases: *Bank v. Carrollton R. R.*, 11 Wall. 624, 20 L. Ed. 82; *Shanks v. Klein*, 104 U. S. 18, 26 L. Ed. 635; *Rommerdahl v. Jackson*, 102 Wis. 444, 78 N. W. 742; *Collumb v. Read*, supra; *Goldthwaite v. Janney & Cheney*, 102 Ala. 431, 15 South. 560, 28 L. R. A. 161, 48 Am. St. Rep. 56; *Page v. Thomas*, 43 Ohio St. 38, 1 N. E. 79, 54 Am. Rep. 788; *Seeley v. Mitchell's Assignee*, 85 Ky. 508, 4 S. W. 190; *Beecher v. Stevens*, 43 Conn. 588; *Hewitt v. Rankin*, 41 Iowa, 35; *Lindley on Partnership* (2d Am. Ed.) * 341 and note B. Those were cases in which one partner assigned his entire interest in the partnership property to an outsider, or in which title to real estate purchased with partnership funds or originally contributed to the partnership capital was involved. In the first class of cases it was held that the outsider did not, by the assignment, become a partner, but acquired the right to an accounting only. In the second class of cases it was held that the real estate, in whosoever name it stood, was held in trust for creditors and other copartners till their interests were satisfied or waived.

By reason of the peculiar facts involved in those cases and the legal principles applicable to them they afford no authority for the disposition of this case, which involves totally different facts and is governed by different principles. The case of *Hewitt v. Rankin*, supra, was a suit to foreclose a mortgage upon partnership property in which priority of liens was involved. The Supreme Court, in delivering its opinion, said:

"Real estate held by a partnership is to be regarded as the property of the firm, as to the creditors and all persons dealing with it, where necessary to

protect their rights. * * * When the business of the partnership is closed, and its debts are paid and there are no equities in favor of third persons requiring real estate of the firm to be held subject to the foregoing rule, the partners, or their representatives, hold a direct interest therein, and, as between them, it is to be regarded as real estate, and subject to all the rules applicable thereto. In such cases it is to be regarded as the real estate of the partner in favor of his individual creditors. The conversion of real estate into personalty under the rule first above stated is a device of equity in order to effectuate the settlement of partnerships and to devote all the property to the payment of the firm debts, a result highly equitable, which the courts will never fail to attain. The reason of the rule ceasing in the absence of creditors of the firm, or others having like equities, the rule itself should no longer be applied. Hence the exception we have just stated." Citing *Wilcox v. Wilcox*, 13 Allen (Mass.) 252, and a number of other cases.

Eight months before the time Clark executed the mortgage to his father the partnership between him and Lyster had been dissolved; there were no outstanding debts, and Lyster had no direct or contingent right in Clark's interest. Clark then, according to the true intent and meaning of their contract, was the equitable owner of the undivided interest in the land, unaffected by any of the partnership obligations. Lyster was in default. He had allowed eight months to pass without complying with the imperative condition of his bond to reconvey Clark's interest to him. In that condition of things, if Lyster had done his duty and had reconveyed the land to him according to his obligation, Clark would have had the combined legal and equitable title to it, and could undoubtedly have mortgaged or sold it at his pleasure.

In view of these facts, it is contended by the defendant that as Clark did not have the legal title to the land when he executed the mortgage to his father, but only an equitable right to it by reason of Lyster's bond, he had no mortgageable interest in it. This is not the law. Clark had a perfect equitable title which, except for Lyster's default, would have been converted into a legal title. That equitable right was the subject of sale and mortgage. *Reed v. Munn*, 80 C. C. A. 215, 148 Fed. 737, recently decided by this court. It was so held by the Supreme Court of Kansas in *Jones v. Lapham*, 15 Kan. 540, 544. That case involved the very question now under consideration. The holder of a bond for a deed had given a mortgage upon his equitable right quite as Clark did in this case. Mr. Justice Brewer, then Judge of the Supreme Court of Kansas, said concerning it as follows:

"Again, it is said that Hull had no mortgageable interest in the land. This is a mistake. True, he did not hold the legal title, but he had an interest in the property. A bond for a deed is often in equity declared to be equivalent to a conveyance of the property with a mortgage back. His was an interest which was the subject of sale, and would pass by a deed of the property. Gen. St. 1869, p. 999, c. 104, § 1, cl. 8; page 185, c. 22, § 2. It was an interest which he could use as security for a loan, and could pass for that purpose by an ordinary real estate mortgage."

That ruling is binding upon us as a rule of property established by the highest judicial tribunal of a state. *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359.

The mortgage of Clark to his father was a recordable instrument under the laws of Kansas. It was an instrument conveying and af-

fecting real estate. "Every instrument in writing that conveys any real estate, or whereby any real estate may be affected, proved or acknowledged, and certified in the manner hereinbefore prescribed, may be recorded in the office of the register of deeds of the county in which such real estate is situated." Section 1221, G. S. 1901. It was filed and recorded in the office of the register of deeds of Wilson county on April 29, 1901, and imparted notice to everybody of its contents. "Every such instrument in writing, certified and recorded in the manner hereinbefore prescribed, shall, from the time of filing the same with the register of deeds for record, impart notice to all persons of the contents thereof; and all subsequent purchasers and mortgagees shall be deemed to purchase with notice." Section 1222, G. S. 1901. Even if the instrument recorded was not a mortgage, technically speaking, it was an instrument of writing recorded in the county where the land in question was situated, and as such imparted notice to every person of its contents and of the extent to which it affected Clark's title. Section 1, of chapter 124, p. 232, of the Session Laws of Kansas of 1901, obviously intended as a curative and remedial provision, reads as follows:

"All deeds, mortgages, releases, powers of attorney, leases, contracts, conveyances and other instruments of writing now recorded, copied or noted in the proper books of the office of register of deeds of the several counties in the state of Kansas, shall, upon the passage of this act, be deemed to impart notice to subsequent purchasers, encumbrancers, lessees and all other persons whomsoever so far as and to the extent that such deeds, mortgages, releases, powers of attorney, leases, contracts, conveyances and other instruments of writing may be found recorded, copied or noted on said books of record, notwithstanding any defects existing in the execution, acknowledgment of recording or certificate of recording of the same."

That section took effect May 1, 1901. Complainant's mortgage had then been recorded two days. Lyster purchased the property from the mortgagor nearly a year thereafter, at a time when the public land records fully disclosed the existence and effect of the incumbrance.

Within the purview of each and all the foregoing statutes, the recording of the mortgage was notice to every one of the contents of the instrument and the extent to which it affected the title to the real estate conveyed. In any view we may take of the mortgage in question, whether as a perfect deed of conveyance or an imperfect execution of an intention, it was a recordable instrument under the laws of Kansas, and its record imparted full notice of its contents and effect to all persons whomsoever. The fact disclosed by the record, that Lyster had no actual knowledge of the existence of the mortgage or that he believed the land he was about to purchase from Clark was unincumbered, is quite immaterial. He was bound by law to take notice of the recorded incumbrance, and is conclusively affected with all he could have ascertained by doing so. *Poplin v. Mundell*, 27 Kan. 138; *Smith v. Jones*, 37 Kan. 292, 15 Pac. 185; *Kuhn v. Nat. Bank of Holton* (Kan.) 87 Pac. 551.

The only other question requiring consideration is whether Harvey S. Clark, the mortgagee, is estopped from foreclosing his mortgage. He was the holder in good faith of a mortgage to secure

a just debt due from the mortgagor to him. He did nothing or said nothing to induce Lyster to purchase his son's interest. He did nothing or said nothing to conceal the fact that his son's interest was subject to a mortgage, or to induce Lyster to refrain from examining the land records to ascertain whether the son's interest was free from incumbrance. He lived in Illinois, and when informed that his son was about to settle his suit against Lyster and collect a large amount of money he went to Kansas City, where his son resided and where the collection was to be made, for the purpose of securing payment of his son's debt to him. By reason of the estrangement between the son and Lyster they had no personal interviews, but negotiated their settlement through their solicitors. There is a conflict of evidence as to whether the father arrived in Kansas City before or after the settlement was concluded, and before or after the son had executed his quitclaim deed to Lyster; but however that may be, it is certain the father did not see or have any interview with Lyster or his solicitors until after the transaction had been fully concluded. There was, therefore, no opportunity for this aged man, however disposed he might have been, to deceive Lyster, or any one acting for him in the matter. His chief and only offending is found by the special master to consist of having "close confidential relations with his son"; of being "generous to his son"; of being dominated by his son "to a considerable extent"; of dwelling with his son while in Kansas City attempting to get his debt paid or reduced; of presenting to his son \$10,000 out of the money received from him "to be invested for the benefit of his family." From such relations with and disposition toward his son, which seem to us altogether natural and blameless, together with what the master denominates "contradictory evidence" given by the father (without referring to it, and which after a patient investigation we are unable to discover), and a "lack of interest" (a commendable frame of mind for a witness) which the master says the old gentleman manifested while testifying, he reached the conclusion that the father authorized the settlement between the son and Lyster, and that it would be unjust and inequitable to permit him to foreclose his mortgage to secure the payment of \$19,500, due him from the son. Suppose it be true that the father did authorize the settlement which the son made with Lyster, that fact would have no significance unless the settlement as made purported to involve the conveyance to Lyster of an unincumbered title to the son's one-half interest. But there is no claim that such was the fact. The settlement as made required the son to give a quitclaim deed to Lyster for his one-half interest. That is entirely consistent with the fact as it existed that his interest was incumbered.

From the facts disclosed by this record, and even from the findings made by the master, there is no substantial ground for imputing to Harvey S. Clark, the mortgagee, any fraudulent, wrongful, misleading or injurious conduct toward Lyster which in any manner tended to induce him to believe he was purchasing an unincumbered title to the son's undivided interest, or to refrain from resorting to the land records and making the inquiry which common prudence and the law of the land required of him. The worst that can be said against the

father is that he did not ascertain the whereabouts of the respective solicitors for his son and Lyster while they were negotiating the terms of the settlement and volunteer to instruct Lyster concerning his duty. If he had been present with them he might lawfully have observed silence on the subject under consideration. *Files v. Rankin*, 82 C. C. A. 491, 153 Fed. 537, recently decided by this court. But he was in fact both distant from them and absolutely silent. The rule caveat emptor applies, and Lyster cannot complain.

It is again said, that because the father received of a son a part of the proceeds of the settlement made with Lyster and was generous to his son's family, these facts in some way make against the father's equity in this case. We fail to see in them anything injurious to Lyster. Whatever became of the money paid by Lyster to the son did not concern the former. It was not his money. He owed money to the son which he paid, and the son owed money to his father, a part of which he paid, and the father afterwards made a donation to the son's family. If there was any doubt about the mortgage debt these acts might have been significant; but on the proof and findings no such doubt exists. Accordingly, the acts in question must be referred to their natural motive—a desire to close a business transaction, and to practice, so far as the father is concerned, a little of the praiseworthy generosity which the master finds characterized his general conduct toward his son. By such inoffensive conduct as that already considered, defendant Lyster contends that complainant's contract, duly and formally executed in writing and under seal, should be set aside and his rights thereunder forfeited. To strike down rights secured with such care and formality by resort to the doctrine of estoppel in pais, every consideration of justice requires that the proof should be clear, cogent, and convincing, and the facts leading to that result should be clearly established. *Brant v. Virginia Coal & Iron Co.*, 93 U. S. 326, 334, 23 L. Ed. 927; *First National Bank v. Marshall & Ilsley*, 28 C. C. A. 42, 83 Fed. 725, 735. The evidence adduced in this case falls far short of that reasonable requirement, and facts are not established from which complainant can be justly and equitably decreed to be estopped from enforcing his legal rights.

Again, equitable estoppel is generally predicated upon positive or constructive fraud, or gross negligence tantamount to it. Unless one or the other of these elements are found in a case, estoppel does not ordinarily exist. 1 Story's Eq. Jur. 391; *Brant v. Virginia Coal & Iron Co.*, supra; *Hobbs v. McLean*, 117 U. S. 567, 580, 6 Sup. Ct. 870, 29 L. Ed. 940; *John Shillito Co. v. McClung*, 2 C. C. A. 526, 51 Fed. 868, 876. Tested by the last-mentioned rule, the record fails to disclose any such conduct or acts on complainant's part as requires or justifies us in holding him estopped from foreclosing his mortgage. Moreover, it is essential, as a general rule governing equitable estoppel, that the party claiming to have been influenced by the conduct of another to his injury must himself have been ignorant of the true state of facts, and not have been guilty of negligence or want of due care in availing himself of opportunities open to him for ascertaining knowledge of such facts. *Debenture Co. v. Hopkins*, 63 Kan. 678, 66 Pac. 1015. "Equity will not assist a man whose condition is at-

tributable only to that want of diligence which may be fairly expected from a reasonable person." *Southern Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678; *Burk v. Johnson*, 146 Fed 209, 216, 76 C. C. A. 567. "It is also essential for its" (principle of equitable estoppel) "application with respect to the title of real property that the party claiming to have been influenced by the conduct or declarations of another to his injury was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Where the condition of the title is known to both parties or both have the same means of ascertaining the truth, there can be no estoppel." *Brant v. Virginia Coal & Iron Co.*, 93 U. S. 337, 23 L. Ed. 927. See, also, *Bloomfield v. Charter Oak Bank*, 121 U. S. 135, 7 Sup. Ct. 865, 30 L. Ed. 923.

The record in this case discloses, and the master finds, that nothing was said between the parties at the time of the settlement between Clark and Lyster one way or the other about the mortgage in suit. Lyster testified that he made no examination of the land records to ascertain the condition of the title. From these facts it is clearly apparent that he did not rely upon any representation, act, or conduct of the complainant, and that he by his failure to examine the land records—the appropriate place for information, and one to which all persons are required to resort—was guilty of that negligence and indifference to his own rights which disentitles him to any equitable consideration. In the cases of *Johnson v. Williams*, 37 Kan. 179, 14 Pac. 537, 1 Am. St. Rep. 243, and *Kuhn v. Nat. Bank*, *supra*, the Supreme Court of his own state has so declared.

It is claimed that defendant, during the two months or more which elapsed after receiving Clark's quitclaim deed and before this suit was instituted, made extensive repairs upon the premises in question; that they were of little value before the repairs were made, and that their present value is largely given to them by defendant's expenditures. There is a sharp dispute about the value of the premises before the repairs were made, but, whatever be the fact in that particular, the defendant, from what has already been said, is the author of his own misfortune. It cannot be contended that complainant by dint of any word, act, suggestion, or influence so misled or induced him to spend any money on the premises, or to refrain from examining the land records to ascertain the truth about his title, as to estop him from asserting his lawful rights.

The decree below dismissing the bill cannot be sustained. It must be reversed, and the cause remanded to the Circuit Court with instructions to enter a decree in favor of the complainant; and it is so ordered.

(155 Fed. 524.)

DOWAGIAC MFG. CO. v. McSHERRY MFG. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. July 18, 1907.)

No. 1,711.

1. COURTS—CIRCUIT COURT OF APPEALS—JURISDICTION IN MANDAMUS.

A Circuit Court of Appeals of the United States has no power to interfere by mandamus with the action of a Circuit Court, where the question involved relates to its jurisdiction as a Circuit Court of the United States, but the application in such case must be made to the Supreme Court; but such want of power in the Circuit Court of Appeals does not exist where the question involved relates to the jurisdiction of a Circuit Court as a judicial tribunal of original jurisdiction, having no relation to its limitation as a national court.

[Ed. Note.—Jurisdiction of Circuit Court of Appeals in general, see notes to *Lau Ow Bew v. United States*, 1 C. C. A. 6; *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 475.]

2. MANDAMUS—SUBJECTS AND PURPOSES OF RELIEF—CONTROLLING JUDICIAL ACTION.

Mandamus will lie to control the action of an inferior court when it assumes to act beyond its jurisdiction, or where it refuses to take jurisdiction of a case and proceed to judgment therein when it is its duty to do so, and there is no other adequate remedy, but not to control its action in a matter which is within its jurisdiction to hear and determine.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 62.]

3. EQUITY—DECREE—BILL OF REVIEW—GROUNDS—FRAUD.

Fraud in obtaining a decree cannot be made the basis of a bill of review, but only of an original bill to impeach the decree for fraud; the radical difference between the two kinds of bills being that a bill of review is a continuation of the original litigation, whereas a bill to impeach a decree for fraud is new and independent litigation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 1090.]

4. JUDGMENT—EQUITABLE RELIEF—PENDENCY OF APPEAL—EFFECT.

A bill to impeach a decree for fraud, the relief sought being an injunction to restrain its enforcement, is not the same in purpose as an appeal, and the court which rendered the decree has jurisdiction to entertain such a bill, although an appeal from the decree is pending.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 771.]

On Petition for Writ of Mandamus Directed to the Circuit Court of the United States for the Western Division of the Southern District of Ohio, and the Judges Thereof.

F. L. Chappell, for petitioner.

B. F. Harwitz and E. E. Wood, for respondents.

Before LURTON and RICHARDS, Circuit Judges, and COCHRAN, District Judge.

COCHRAN, District Judge. The writ of mandamus sought by the petition herein is one commanding that an order be entered vacating an order made May 20, 1907, granting a preliminary injunction. That order was made in a suit brought in said court May 15, 1897, by the petitioner, Dowagiac Manufacturing Company, as plaintiff, against the respondents, McSherry Manufacturing Company, C. R. Oglesby, and T. O. Eichelberger, as defendants, for infringement of certain letters patent, in which an injunction and an accounting were sought.

It was made on application of the defendant C. R. Oglesby, upon what was termed a cross-bill filed by him April 27, 1907. This pleading was filed and said injunction was granted after a final decree in said suit and whilst appeal therefrom was pending in this court, which is still undisposed of. That decree was rendered August 14, 1906. By it the plaintiff recovered of the defendants the sum of \$47,855.95 and costs. It was not superseded on the taking of the appeal, and on April 18, 1907, the time within which it might be having elapsed, the plaintiff caused an execution to issue and be levied on certain real estate owned by the defendant Oglesby. The preliminary injunction granted restrained proceedings on said execution until the further order of the court. The relief prayed by said pleading was an injunction against further proceedings thereon, and the ground upon which it was sought was that said decree, as to the defendant Oglesby, had been obtained by fraud. The fraud complained of was that said defendant had been president of the defendant company, but at the time of the filing of the bill had ceased to be such, or a stockholder in the company; that individually he had not infringed, or received any profits from the infringement of, the letters patent in suit; that after answer filed plaintiff's solicitor and managing counsel represented to him, on inquiry by him as to why he had been made a party to the suit, that it was usual and ordinary in patent cases to make officers of corporations parties thereto, that he was a mere nominal party, and that he need not give the matter further concern or attention; and that, relying on said representation, he did not give the matter further concern or attention and had no knowledge of the proceedings thereafter had until subsequent to the rendition of the final decree and service of copy thereof on him.

This case presents the question as to whether this court has the power to and should interfere by mandamus with this action of the lower court? It would seem that a Circuit Court of Appeals of the United States has no power to interfere by mandamus with the action of a Circuit Court thereof, where the question involved relates to its jurisdiction as a Circuit Court of the United States. In the case of *United States v. Severens*, 71 Fed. 768, 18 C. C. A. 314, we held that, where its decision in regard thereto can be carried directly to the Supreme Court upon certificate under the fifth section of the Circuit Court of Appeals act, the application for a writ of mandamus must be made to that court. In the cases of *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, and *In re Pollitz*, 206 U. S. 323, 27 Sup. Ct. 729, 51 L. Ed. 1081, the question arose in removal cases. The application for the writ was made in each instance to the Supreme Court. In the *Wisner Case* it was granted, whereas in the *Pollitz Case* it was denied, but not on the ground that that court was not the proper court to which to make the application. In view of these decisions it would seem that in such cases it is not proper to make the application to the Circuit Court of Appeals, and that therefore in no case has that court power to interfere by mandamus with the action of a Circuit Court of the United States where the question involved relates to its jurisdiction as a Circuit Court of the United States.

If so, the only case in which that court can have power to interfere

by mandamus with the action of the Circuit Court, where the question involved relates to its jurisdiction, is where the question is as to its jurisdiction as a judicial tribunal of original jurisdiction. In the case of *United States v. Swan*, 65 Fed. 647, 13 C. C. A. 77, we heard, but denied, an application for mandamus in such a case. The question here is as to the jurisdiction of the lower court as a tribunal of original jurisdiction. There is nothing, therefore, in the nature of the case itself against this court's power to grant the mandamus sought. If it is not right that the writ should be granted, it is because the case does not come within the principles allowing the issuance of a mandamus applicable to such cases. In the *Pollitz Case* Mr. Chief Justice Fuller had this to say as to when a writ of mandamus will not be issued by the Supreme Court to a Circuit Court, to wit:

"But mandamus cannot be issued to compel the court to decide a matter before it in a particular way, or to review its judicial action had in the exercise of legitimate jurisdiction; nor can the writ be used to perform the office of an appeal or writ of error."

He referred to two instances in which it will be issued. One he referred to in these words:

"Where the court refuses to take jurisdiction of a case and proceed to judgment therein when it is its duty to do so, and there is no other remedy, mandamus will lie unless authority to issue it has been taken away by statute."

The other, he referred to, in these words:

"And so where the court assumes to exercise jurisdiction on removal, when on the face of the record absolutely no jurisdiction has attached."

The sum of these expressions is that the writ will not be so issued when the action of the Circuit Court is within its jurisdiction. It will be issued when it is not up to or goes beyond its jurisdiction and there is no other adequate remedy.

In that case a suit brought by a citizen of New York, against a citizen of Ohio and citizens of New York in the proper state court of New York had been removed by the citizen of Ohio into the Circuit Court of the United States for the Southern District of New York on the ground that it involved a separable controversy between him and plaintiff, who were of diverse citizenship. That court, on motion to remand, held that there was such a controversy in the suit and overruled the motion. The application for the writ was denied, for the reason that it was within the jurisdiction of that court to hear and determine the question as to separable controversy on which its jurisdiction depended, and error in regard thereto could be raised only by appeal after final decree. In the *Wisner Case*, where the writ was granted, a suit brought by a citizen of Michigan against a citizen of Louisiana in the proper state court of Missouri had been removed to the Circuit Court of the United States for the District of Missouri, Eastern Division, and that court had overruled a motion to remand and taken jurisdiction of the suit. The writ was granted, for the reason that the action of the lower court was beyond its jurisdiction. The suit could not have been originally brought there, and hence could

not be removed thereto. Its jurisdiction depended on no question which it had the jurisdiction to determine as in the Pollitz Case.

The same principles apply here, though the only question as to jurisdiction involved is in respect to the authority of the lower court as a judicial tribunal of original jurisdiction. If the action of the lower court was within its jurisdiction as such a tribunal, it cannot be interfered with by mandamus, no matter how erroneous it may have been. Error therein can be inquired into only upon appeal from the order granting the preliminary injunction. It is only in case its action went beyond its jurisdiction as such a tribunal that the petitioner can be entitled to the mandamus it seeks. It is claimed that it did go beyond such jurisdiction, and that on the ground that, pending the appeal from its final decree, the lower court was without jurisdiction to grant said injunction. The case of *Ensminger v. Powers*, 108 U. S. 292, 2 Sup. Ct. 643, 27 L. Ed. 732, is cited in support of this position. In that case it was held that a bill of review cannot be filed pending an appeal from a final decree. There a final decree in favor of the defendant was entered by the Circuit Court in December, 1873. An appeal therefrom to the Supreme Court was taken by plaintiff in January, 1874. This appeal was dismissed in December, 1875, for failure of appellants to file and docket the cause on the appeal. In September, 1876, a bill of review for error of law was filed. It was claimed that it was filed too late, as the time within which ordinarily a bill of review may be filed is the time limited by statute for taking an appeal from the decree sought to be reviewed, which in this instance was two years. It was held that the time during which said appeal was pending should be deducted, and that therefore the bill was filed in time. The ground upon which it was held that such deduction should be made was that, pending the appeal, the plaintiffs had no right to file a bill of review. Mr. Justice Blatchford said:

"The pendency of the appeal by Bridget Power would have been a valid objection to the filing of a bill of review by her for the errors of law now alleged, and inasmuch as the appeal was not heard here on its merits, but the prosecution of it was abandoned, we are of opinion that the bill of review was filed in time. While the appeal was pending here, although there was no supersedeas, the Circuit Court had no jurisdiction to vacate the decree in pursuance of the prayer of a bill of review, because such relief was beyond its control."

It is to be noted, however, that this holding has relation to a bill of review. Concerning such a bill Judge Sanborn, in the case of *Hill v. Phelps*, 101 Fed. 650, 41 C. C. A. 569, had this to say:

"The purpose of a bill of review is to obtain a reversal or modification of a final decree. There are but three grounds upon which such a bill can be sustained. They are: (1) Error of law apparent on the face of the decree and the pleadings and proceedings upon which it is based, exclusive of the evidence; (2) new matter which has arisen since the decree; and (3) newly discovered evidence which could not have been found and produced by the use of reasonable diligence before the decree was rendered."

The alleged cross-bill filed in the lower court cannot, therefore, be characterized as a bill of review. The ground upon which it sought relief was neither one of the three grounds upon which such a bill can be sustained, but another and entirely distinct ground, to wit, that

the decree had been obtained by fraud. Such a ground of relief can be made the basis, not of a bill of review, but only of an original bill, or, as it is sometimes called, an original bill in the nature of a bill of review. 2 Beach, Mod. Eq. Pr. § 884. Daniell's Chancery Pleading and Practice (5th Ed.) p. 1584, characterizes such a bill as a bill to impeach a decree for fraud. In the case of *Tilghman v. Werk* (C. C.) 39 Fed. 680, Judge Jackson said that such a bill "lies only for fraud; and such fraud, as has been said by very eminent judicial authority in an English case, must be actual and positive, showing a mala mens—a meditated and intentional contrivance to keep the opposite party and the court in ignorance of the real facts of the case and thus obtain the decree. *Patch v. Wood*, L. R. 3 Ch. 203."

The radical difference between these two kinds of bills is that a bill of review is a continuation of the original litigation, whereas a bill impeaching a decree for fraud is not. It is new and independent litigation. The rules applicable to the two kinds of bills are different. As, for instance, it is well settled, in certain jurisdictions at least, that a bill of review cannot be filed after a decree has been affirmed on appeal, at least where the ground thereof is newly discovered evidence, unless the right to file it has been reserved in the decree of the appellate court, or permission be given on application to that court directly for that purpose. *Southard v. Russell*, 16 How. 545, 14 L. Ed. 1052; 2 Bates on Fed. Eq. Proc. § 717. But such is not the case as to a bill to impeach a decree for fraud. It can be filed without such leave being first had. 2 Daniell's Ch. Pl. & Pr. (5th Ed.) 1584; 2 Beach, Mod. Eq. Pr. § 884; *Ritchie v. Burke* (C. C.) 109 Fed. 16, 18.

It may be said, however, that the ground upon which a bill of review cannot be filed pending an appeal from the decree sought to be reviewed exists with equal force when a decree is sought to be impeached for fraud pending an appeal therefrom, and should equally prevent such a bill being filed during the pendency thereof. The reason why a bill of review cannot be filed pending an appeal from the decree sought to be reviewed was not pointed out in the case of *Ensminger v. Powers*. Probably it is this: An appeal and a bill of review are both direct attacks upon the decree itself. Each is a different mode of seeking to have the same thing done; i. e., to have the decree vacated and set aside. The success of either will render the other unnecessary so far as the effect on the decree is concerned; and, as the appeal is first in time, it should be given the right of way. If this is the true reason for this rule, there is room to hold that it applies in case a bill impeaching a decree for fraud is filed, pending an appeal therefrom, where the bill is limited to seeking to have the decree vacated and set aside, or in so far as it seeks to have such relief; and it is hard not to yield to the position that it should be given the same effect in such a case, or to such an extent, as in case of a bill of review. It may be urged that the fact that the latter is a continuation of the original litigation, whereas a bill of the other kind is not, is not sufficient to require a different rule.

But a bill impeaching a decree for fraud need not, in so far as it seeks relief, concern itself with the decree. It may be limited to seek-

ing an injunction against its enforcement or to depriving the party in whose favor it has been rendered of the benefit which he has derived from it. Indeed, it may be that such is all that such a bill is ever properly concerned with. If such a bill is so limited, the above reasoning cannot be applied to prevent its being filed pending an appeal from the decree. The two proceedings are not in such a case seeking the same relief. The appeal is seeking to have the decree vacated and set aside, whereas the bill is seeking to prevent its enforcement or to obtain a restoration of the benefits derived under it. It is on the ground that such a bill may be so limited, or such is its proper nature, that it has been held that a Circuit Court of the United States can give relief against a decree of a state court obtained by fraud. It was so held in the cases of *Gaines v. Fuentes*, 92 U. S. 10, 23 L. Ed. 524, and *Marshall v. Holmes*, 141 U. S. 597, 12 Sup. Ct. 62, 35 L. Ed. 870, where the bills sought an injunction against an enforcement of the decrees, and also in the cases of *Johnson v. Waters*, 111 U. S. 667, 4 Sup. Ct. 619, 28 L. Ed. 547, and *Arrowsmith v. Gleason*, 129 U. S. 99, 9 Sup. Ct. 237, 32 L. Ed. 630, where the bills sought a restoration of benefits derived under them. In the case of *Barrow v. Hunton*, 99 U. S. 80, 25 L. Ed. 407, it was held that a federal court had no jurisdiction of a direct attack on the decree of a state court. Mr. Justice Bradley there said:

"The question presented with regard to the jurisdiction of the Circuit Court is whether the proceeding to procure nullity of the former judgment in such a case as the present is or is not in its nature a separate suit, or whether it is a supplementary proceeding so connected with the original suit as to form an incident to it, and substantially a continuation of it. If the proceeding is merely tantamount to the common-law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review or an appeal, it would belong to the latter category, and the United States Court could not properly entertain jurisdiction of the case. Otherwise the Circuit Courts of the United States would become invested with power to control the proceedings in the state courts, or would have appellate jurisdiction over them in all cases where the parties are citizens of different states. Such a result would be totally inadmissible. On the other hand, if the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding, and, according to the doctrine laid down in *Gaines v. Fuentes*, 92 U. S. 10, 23 L. Ed. 524, the case might be within the cognizance of the federal courts. The distinction between the two classes of cases may be somewhat nice, but it may be affirmed to exist. In the one class there would be a mere revision of errors and irregularities, or of the legality and correctness of the judgments and decrees of the state courts; and in the other class the investigation of a new case arising upon new facts, although having relation to the validity of an actual judgment or decree, or of the party's right to claim any benefit by reason thereof."

It must be held, therefore, that there is nothing in the case of *Enslinger v. Powers* that militates against the lower court having jurisdiction, pending an appeal to this court from its decree, to hear an application for an injunction against the enforcement thereof on the ground that it had been obtained by fraud, and of granting such application if a proper case for such a relief was made. This was all the relief which said alleged cross-bill sought, and is all the relief granted by the preliminary injunction complained of.

The fact that a reversal of the decree on the appeal will render unnecessary the continuation of the injunction, or, rather, deprive it of further effect, is not against the court's jurisdiction to grant it. Nor is the fact that the decree might have been superseded, and was not. It is inequitable that a decree shall be enforced, and the party affected by it shall be harassed thereby, when that decree has been obtained by fraud, and this equity on his part is not weakened by either circumstance. He should not be put to the necessity of superseding such a decree, nor run the risk of not getting back property taken from him thereunder. The action of the lower court, therefore, was clearly within its jurisdiction as a judicial tribunal of original jurisdiction.

It is urged, however, that the cross-bill contradicts the record in alleging that the defendant Oglesby had ceased to be a stockholder and president of the defendant company at the time of the filing of the bill; the record showing that he ceased being so shortly after the filing of the bill, and not before; that the subject-matter of the cross-bill could have been raised in the answer filed before decree, and was not, therefore, proper subject-matter for a cross-bill; and that a cross-bill cannot be filed after a final decree. The case of *Dickerman v. Northern Trust Co.*, 80 Fed. 450, 25 C. C. A. 549 is cited in support of the second proposition just stated, and the cases of *Rogers v. Riessner* (C. C.) 31 Fed. 591, and *Bronson v. La Crosse & Milwaukee R. R. Co.*, 67 U. S. 528, 17 L. Ed. 359, are cited in support of the third and last one.

But it is not true that the subject-matter of the cross-bill could have been raised by answer filed before decree. The subject-matter of the cross-bill was not defendant Oglesby's liability to plaintiff, but that the decree against him had been obtained by fraud. This could not have been set up before the decree. It is true, however, that a cross-bill cannot be filed after final decree. This position was urged in the lower court against the granting of the preliminary injunction, and Judge Clark, who heard the matter, responded to it in these words:

"It is not necessary to undertake now to fix the technical name of the bill, or petition, as it may be called, filed in this case, or to determine whether technically it should be called an original bill, cross-bill, a bill in the nature of a bill of review, or a petition in the cause. There can be no doubt that such jurisdiction and power as exists to grant an injunction pending the appeal before the Circuit Court of Appeals exists in the judge of the court below, and that also such power as the judge may exercise, if properly invoked by a pleading or petition in this same case, rather than by an independent bill. The subject-matter and purpose of the pleading must be looked to, to determine its proper designation under the law of procedure, and not the name under which it may be filed in court."

But, the lower court having jurisdiction to hear and determine a case of the kind presented by said pleading, it was within its jurisdiction to determine also as to the propriety and sufficiency of the proceedings by which it was presented. If it has erred in this particular, the error can be corrected by this court only upon an appeal from the order granting the preliminary injunction. It cannot do so by mandamus.

The petition for the writ is denied.

(155 Fed. 531.)

PRINDLE v. BROWN et al.*

(Circuit Court of Appeals, First Circuit. August 2, 1907.)

No. 634.

1. PATENTS—REMEDY IN EQUITY FOR REFUSAL OF PATENT—SCOPE.

The broad scope of Rev. St. § 4915 [U. S. Comp. St. 1901, p. 3392], authorizing a suit in equity to establish the right to a patent, was in no way limited or qualified by Act Feb. 9, 1893, c. 74, 27 Stat. 434 [U. S. Comp. St. 1901, p. 3391], providing for appeals from the decision of the Commissioner of Patents to the Supreme Court of the District of Columbia.

2. SAME—SUFFICIENCY OF BILL.

A bill filed under Rev. St. § 4915 [U. S. Comp. St. 1901, p. 3392], to establish the right of complainant to a patent which alleges that "before the sixth day of June 1900" complainant "was the true, original, and first inventor" of the device in issue, that on that day he filed his application for a patent therefor, and that on May 28, 1900, defendant filed an application for the same invention on which after interference proceedings he was awarded a patent, is not fatally defective on general demurrer.

3. SAME—ALLEGATION OF DATE OF INVENTION.

A bill which states the date of an application for a patent is not to be held to state that the invention was then first completed or reduced to practice unless nothing is alleged showing invention prior thereto, and a further allegation that the invention was made prior to such date covers the fact of reduction to practice, and is sufficient to carry the date back of the application.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

For opinion below, see 136 Fed. 616.

Edwin J. Prindle, pro se.

William Quinby, for J. T. Brown and O. A. Miller.

Emery & Booth, for Walter E. Trufant.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This is a bill seeking to establish a patent for an invention in accordance with section 4915 of the Revised Statutes [U. S. Comp. St. 1901, p. 3392]. It was heard on demurrer in the Circuit Court, and dismissed; whereupon the complainant appealed to us. There was also filed in the Circuit Court a cross-bill, which was likewise dismissed on demurrer; but, there being no appeal from that decree, we have no occasion to consider that proceeding.

The application of the complainant below for a patent was decided against him by the Commissioner of Patents, whose decision was affirmed by the Circuit Court of Appeals of the District of Columbia, as appears by *Prindle v. Brown*, 24 App. Cas. D. C. 114. That proceeding was brought under section 4914 of the Revised Statutes, as amended by the act to establish the Court of Appeals of the District of Columbia, approved on February 9, 1893 (27 Stat. 434, c. 74). Section 4914 directs that the case be heard on the evidence produced before the Commissioner of Patents. It has never been held to preclude a proceeding under section 4915; and the propositions of the Supreme

*Rehearing denied October 16, 1907.

Court in *Re Hien*, 166 U. S. 432, 439, 17 Sup. Ct. 624, 41 L. Ed. 1066, leave no opportunity for any contention that the broad range of section 4915 has been in any way limited or qualified by the act of 1893.

The bill in the Circuit Court was filed by the present appellant against Brown, Miller, and Trufant. Trufant answered, and did not demur. Brown and Miller demurred jointly. One of the grounds of demurrer is that Trufant has no interest in any pending issue, and was not a proper party respondent, and that the bill should be dismissed as against him; but no point as to parties has been made before us. The demurrer contains 12 different assignments of causes of demurrer; and, although the arguments at bar took a very broad range, we are unable to perceive that any topic is presented here except the following:

The bill alleges at the beginning of it that, "before the 6th day of June, 1900," Prindle "was the true, original, and first inventor" of the improvement in issue, and that an application for a patent therefor was filed by him on that day, the ultimate refusal of which application is the subject-matter of this litigation. It also alleges that Trufant on September 27, 1899, filed an application for a patent for the same invention; that this application was abandoned; that on August 1, 1901, he filed a second application; that the later application was put in interference with Prindle and Brown; and that finally priority was awarded to Brown by the Commissioner, which decision was sustained on appeal, as we have already said. The bill nowhere alleges or admits that Trufant obtained a patent. There are allegations that Trufant disclosed an invention to Miller, and that Miller, "seeking surreptitiously to appropriate the aforesaid invention," disclosed it to Brown, and caused Brown to file in the Patent Office an application on May 28, 1900, and that this resulted in the patent to Brown which the complainant now seeks to supersede. The bill does not allege whether Trufant conceived the same invention that the complainant conceived, or derived the knowledge of it from the complainant, or, indeed, whether he conceived any invention whatever. This is of no consequence as the case stands. The only material thing on this appeal in all these allegations is that an application was made by Trufant, and also one by Brown on May 28, 1900. This was eight days before the application was made by the complainant; so that if the complainant's pleadings limit him under the ordinary rule that, when no other date is disclosed, the invention does not run back of the day of the filing of the application, it follows that the bill cannot be sustained. But we do not find any such condition of pleadings.

The view of the learned judge of the Circuit Court was that, on the allegations of the bill, it cannot be said that Prindle's invention preceded the date of the filing of his application on June 6, 1900; but the bill alleges that Prindle was the true, original, and first inventor, and at various points it repeats that he was the inventor. It is true that, if the only thing alleged was that Prindle's application was filed on June 6th, the dates would negative priority on the part of Prindle; but the word "before," which we have shown is connected in the bill with the words "the 6th day of June," leaves no contradiction on the face of the pleadings. Therefore the record stands that Prindle was the true, original, and first inventor, which is all that is required

by section 4892 of the Revised Statutes [U. S. Comp. St. 1901, p. 3384], as amended, in regard to the mere particular of priority. This, of course, overrules to the common understanding the allegations of the dates of the applications made by Trufant and Brown. The other dates given in the bill stand without support from anything else in the proceedings.

The only difficulty, therefore, is that the words "before the 6th day of June" are uncertain because they do not allege a precise date, and therefore do not conform to the ordinary rules of pleading. This uncertainty, however, does not relate to any matter of substance, because, so far as the substance is concerned, Prindle's priority is positively alleged. It relates only to a matter of form. The demurrer assigns 12 alleged errors in the pleadings, none of which have been brought to our attention by the respondents; but it fails to make any assignment against the allegation "before the 6th day of June." Being an uncertainty in a mere matter of form, this is good even at common law unless especially assigned as error. 1 Chitty on Pleading, *277, *709. The same rule also applies in equity. Story's Equity Pleadings (10th Ed.) § 528.

But the rule in equity goes even farther. The respondents maintain that, on a demurrer of this character, the bill should be dismissed unless its allegations contain distinct and "unmistakable averment" of what is necessary to maintain the suit. So strong a rule as this is not applicable even at common law, except as to pleas in abatement, which are required to be certain to a certain intent; and in equity the rule is the reverse. Equity seeks to act on the merits, which is not always attainable on a demurrer; and therefore equity will usually direct an answer unless the demurrer shows that, for want of proper allegations, it is "an absolutely certain and clear proposition that the bill would be dismissed at the hearing on the merits." Daniell's Chancery Practice (6th Am. Ed.) 543. It is worth while in this connection to turn to *Swift v. United States*, 196 U. S. 375, 395, 25 Sup. Ct. 276, 49 L. Ed. 518, for a statement of the rule which secures a liberal interpretation pro and con of pleadings in equity, to the effect that they are to be taken to mean what their language fairly conveys to a dispassionate reader, in accordance to a fairly exact use of English speech. The reason for the difference in practice on demurrer between common law and equity is very plain. According to proper pleadings at common law, a plaintiff's case is stated succinctly, while in equity the relations of the parties are more frequently complicated, and the circumstances which may shade the relief to which he is entitled, if any, or which may indeed bar his right to relief at all, are often so mixed that it is not easy for the court to perceive their precise bearings until the facts are all worked out at the hearing on the merits. The practice in this respect was applied by the Supreme Court, and the reasons therefor worked out under very important and interesting conditions, in *Kansas v. Colorado*, 185 U. S. 125, 144, 145, 22 Sup. Ct. 552, 46 L. Ed. 838; and the wisdom exercised by the court in postponing consideration of matters of law appearing on the pleadings until the hearing on the merits was made very apparent by the further opinion in the same case, passed down on May 13, 1907,

with a judgment dismissing the bill. Of course, this does not relate to matters necessary to good pleading when specifically pointed out by the demurrer. Taking the bill together, it is impossible to conceive that the complainant had any intention on the question of priority except to assert it in his own behalf and to frame his allegations accordingly; and therefore, for the reasons we have stated, we are justified in entering a judgment which will postpone that question to the hearing on the merits, unless, having in view their right to a specific date of invention, on subsequent proceedings in the Circuit Court, and on proper terms, the respondents make the issue more specifically than they have so far done.

Much has been said to us in reference to the reduction of an invention to practice by the filing of an application for a patent therefor, and in some manner the parties seem to have impressed the learned judge of the Circuit Court with the thought that that involved the more important issue in the case. Consequently his opinion apparently relies on a proposition that the allegation in the bill of the date of Prindle's invention must be taken to state its reduction to practice by the application of June 6th. It is true that there is no patentable invention in a mere mental operation, and that the general rule is that, in order to constitute a patentable invention, the mental operation must in some way be put into concrete form. Prof. Robinson's work on Patents (volume 1, 178) well says:

"No mental operation, however definite and valuable may be its result, is a complete inventive act. That which rests in thought only as a mere theory or intellectual conception can never be a means producing physical effects."

It is also true that the Patent Office and the courts, where no date is proven except that of the application for the patent, give the patentee the benefit of that date where his application, specifications, and claims explain what, if constructed in conformity therewith, would constitute a workable and useful machine. It is also true that it is sometimes said, as was said by the parties in this case, and also by Mr. Walker in his work on Patents (4th Ed. § 141b) that such an application is a "constructive reduction to practice." The use of such expressions in connection with an application seems to be an unnecessary paraphrase, because an application of the character which we have described is of itself a positive and absolute exhibition of everything which the statute requires to constitute an invention. It is not necessary in order to complete an invention that there be a machine constructed, or even a model. The invention may be disclosed by the application sufficiently to entitle the patentee to priority as of the date of the application, or it may have been disclosed by a machine or model, or in some other concrete manner, a long time before the application was filed, so that the patent whenever applied for would go back to that disclosure. Consequently, a bill which states the date of an application for a patent is not to be held to state that the invention was then first completed, except in the special case, which is not an unusual one, that nothing is alleged showing invention prior thereto. Under some circumstances, the court is then compelled to accept that date; but, as further said by Prof. Robinson in connection with the extract we

have already made from his work, a statement which is also clearly true, "an invention does not exist until the generated idea has been reduced to practice." Therefore, when a bill alleges an invention, it covers the fact of reduction to practice, whatever that may be, without any further allegation in reference thereto. Therefore the bill alleges priority of invention by Prindle, though in an irregular manner.

We must reverse the decree of the Circuit Court; but, as the case will go back to that court for further proceedings, we do not intend by such reversal to bar the respondents from securing the advantage of a proper allegation of the date of the complainant's invention if they are of the opinion that they can obtain any advantage therefrom. Therefore, unless the bill is amended, the Circuit Court may, on a demurrer, allowed on proper terms and specifically pointing out the defect in form which we have discussed, or other defects in form, compel the complainant to perfect his bill in whatever particulars it should be perfected. Although a proper allegation of the time of invention is sometimes very useful for those sued as infringers, yet it is so often unimportant, and, under the circumstances of this case, the lack of it is so purely formal that the bill should not be dismissed unless the complainant's attention is first brought directly to the point, and an opportunity given him to meet it by amendment or otherwise.

The decree of the Circuit Court is reversed, and the case is remanded to that court with directions to proceed in conformity with law; and the appellant recovers his costs of appeal.

(156 Fed. 241.)

THE POKANOKET.

(Circuit Court of Appeals, Fourth Circuit. September 10, 1907.)

No. 727.

MASTER AND SERVANT—CONTRACT OF EMPLOYMENT—DURATION OF EMPLOYMENT.

A verbal contract between the owner of a vessel and a marine engineer for the services of the latter, in which his wages were fixed at a stated sum per month, but without any specified term of employment, constituted a hiring at will, and not by the month, and, in the absence of any established usage to the contrary, either party had the right to terminate the employment at any time without notice, and, upon the employé's discharge, he was entitled to wages only to the time of such discharge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 19.]

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

John W. Oast, Jr., for appellant.

Henry Bowden, for appellee.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

84 C.C.A.—4

BOYD, District Judge. This is an appeal from a decree in admiralty entered by the District Court of the United States for the Eastern District of Virginia, at Norfolk. The appellee, Leslie B. Colgin, a marine engineer, for some time anterior to the making of the contract, which is the basis of this proceeding, was employed as chief engineer on a steamer called "The Aurora," which belonged originally to the James River Navigation Company. Subsequently this steamer was bought by the Newport News & Norfolk Steamboat Line, a corporation under the laws of Virginia, which corporation was also the owner of the steamer named "Pokanoket," the latter vessel being, at the time of the contract of employment, at St. Johns, Newfoundland. The contract of employment, as stated by the libellant in his testimony, was as follows:

"It was a verbal contract between Mr. Davis and me at Petersburg on the steamer Aurora, the steamer I was running on at that time, and he asked me if I would go to St. John and help him look at a boat, and if I would come down with her, and that my wages—he asked me what I would want a month and I gave him my price, \$80 per month, to go chief, and I said I will go down and come with the boat, and he said the wages would be the same as when working on the Aurora, but the day she gets to Norfolk my pay would be \$80 per month and start at that time. I was getting \$70 per month on the Aurora."

The libellant went to St. Johns and brought the Pokanoket to Norfolk, arriving at the latter place on the 16th of May, 1906, and from the time of employment to that date he was paid at the rate of \$70 per month. From the 16th of May, 1906, to the 1st of June following, he was paid at the rate of \$80 per month and for the month of June he was paid \$80, the last payment, to wit, for the month of June, having been made between the 1st and 5th of July, 1906. The libellant continued in the employment of the steamer Pokanoket, as chief engineer, until July 17, 1906, when he was discharged at Norfolk, Va., by George B. Townsend, the agent of the owner. The cause of the discharge, as claimed by the owner of the steamer, was inefficiency and incapacity on the part of libellant to properly manage and operate the machinery which he had in charge. At the time of the discharge the steamboat company proposed to pay the libellant the sum of \$46.99, the amount of his wages for the 17 days in July at the rate of \$80 per month. But libellant refused to accept it. The libellant states that he immediately sought work, but did not succeed in finding employment until August 1, 1906. A libel was filed by Colgin against the steamer Pokanoket, her tackle, apparel, etc., in the District Court for the Eastern District of Virginia, at Norfolk, Va., on the 1st day of August, 1906, the claim being for \$80 wages for the month of July, 1906, and costs. The attachment and monition were served on the 2d day of August, 1906. In the due course of proceeding, the respondent filed its answer on the 10th day of September, 1906, denying the libellant's right to the sum of \$80 wages for the month of July, 1906, and costs, but admitting that there was due him the sum of \$46.99 for 17 days' work in July, 1906, at the rate of \$80 per month. Respondent then and there tendered to the libellant the said sum of \$46.99, with interest thereon from July 17, 1906, which he refused to

accept; whereupon respondent deposited the said sum, together with the interest, in the court, to be held subject to its orders.

There was some testimony, pro and con, upon the hearing as to Colgin's qualifications as a marine engineer—on his part that he was well-skilled and proficient as such, whilst respondent, on the other hand, offered testimony tending to show that he was not capable and well qualified. But, in our view of the case, this controversy is not material. The chief point presented is the construction of the contract under which the libelant was employed. He insists that it was by the month, and that it was a violation of its terms to discharge him except upon a month's notice. The District Court took this view and entered a decree for the libelant for \$80, the full month's wages for July, 1906, and for costs. In this we think there was error. The contract, which is fully set out in the testimony of the libelant as given above, has, in our opinion, the effect to determine the measure of compensation, but does not fix a definite period of employment. In other words, the contract constitutes nothing more, in law, than what is known as a hiring at will, which could be ended at any time, by either party, without notice. There was no evidence of any settled usage or custom of the port which would take the contract in this case out of the rule which governs such contracts generally. There is nothing in the contract of employment which can be construed to mean that the libelant was required to serve the employer for any specified time; nor is there anything to indicate that the employer was bound to retain him in service for a definite period. The continuance of the term of service was left discretionary with both parties, and either had a right to put an end to it at any time.

In the case of *The Pacific* (D. C.) 18 Fed. 703, an engineer was employed on a steam tug used about a harbor at a certain rate per month, but without any agreement as to the duration of his service. Held, in the absence of proof of any settled usage, that he could be discharged at any time without previous notice, and could recover only for the time actually served. The learned judge (Morris), in delivering the opinion in this case, said:

"Unless the verbal contract proved is controlled by usage or custom, or some presumption of law or fact, it must be held to be a general or indefinite hiring, and, I take it, the law as to such a contract is correctly stated in *Wood, Master & Servant*, 272."

The quotation from *Wood* is as follows:

"With us the rule (different from the English rule) is inflexible that a general or indefinite hiring is *prima facie* a hiring at will, and, if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, or year, no time being specified, is an indefinite hiring and no presumption attaches that it was for a day even, but only at the fixed rate for whatever time the party may serve. It is competent for either party to show what the mutual understanding of the parties was in reference to the matter, but, unless their understanding was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring and is determinable at the will of either party. * * * Thus it will be seen that the fact that compensation is measured at so much a day, month, or year does not necessarily make such hiring a hiring for a day, month, or year, but in all such cases the contract may be put an end to

by either party at any time, unless the time is fixed and a recovery had at the rate fixed for the services actually rendered."

Following in the same line is the case of *The Rescue* (D. C.) 116 Fed. 380, in which Judge McPherson, of the Eastern District of Pennsylvania, holds that:

"In the absence of proof of any settled usage or custom of the port, an engineer employed for a vessel at a certain rate of wages per month, without any specified term of service, may be discharged at any time, either during or at the end of a month, without previous notice, and can recover wages only for the time actually served."

The conditions of employment and the terms of the contracts in these two cases were substantially the same as in the case here.

In *Edwards v. Seaboard & Roanoke Railroad Co. et al.*, 121 N. C. 490, 28 S. E. 137, the Supreme Court of the state (Chief Justice Faircloth delivering the opinion) upholds the same doctrine, and declares the law to be that:

"Where a letter from an employer stated, 'You have been appointed general storekeeper of the System, to take effect July 15th. Your salary will be \$1,800 a year'; and the appointee entered upon his duties and received \$150 per month until he was discharged—*held*, that the contract was not an employment by the year, the reasonable construction of the contract being that the parties intended that the service should be performed for the price that should aggregate the gross sum annually, leaving the parties to sever their relations at will."

We might cite, almost without number, decisions in the American jurisdictions to the same effect, but we do not deem it necessary. We conclude, therefore, that the libelant is only entitled under the contract to recover of the respondent compensation at the rate of \$80 per month for the 17 days actually served in July, 1906, and that the decree of the District Court should be modified to that extent. The decree is reversed and the case remanded to the District Court of the Eastern District of Virginia, to the end that a decree in harmony with the views herein expressed may be entered.

Reversed.

(155 Fed. 705.)

CHRISTIAN v. FIRST NAT. BANK OF DEADWOOD, S. D., et al.

(Circuit Court of Appeals, Eighth Circuit. June 10, 1907.)

No. 2,394.

1. CONTRACTS—EQUITABLE INTERPRETATION.

When a contract is fairly open to two constructions, it is legitimate to adopt the one which equity would favor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 734.]

2. SAME—INTERPRETATION WHEN ONE PARTY RESPONSIBLE FOR TERMS EMPLOYED.

If there be doubt as to the true meaning of a written contract, and one of the parties be responsible for the terms employed, it is both just and reasonable that it should be construed most strongly against that party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 736.]

3. BAILMENT—DUTIES OF BAILEE WITHOUT REWARD NOT LIGHTLY EXTENDED BY INFERENCE.

Courts are indisposed to extend, by inference, the perils of an unprofitable trust; and so it is that every bailee without reward is regarded as having assumed the least responsibility consistent with his actual undertaking.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bailment, §§ 37–41.]

4. ESCROWS—DUTIES OF DEPOSITARY—CONVERSION.

Three certificates of stock in a mining company, indorsed in blank and representing shares held by several co-owners, were deposited by them in a bank under an option contract of sale (fully set forth in the opinion), containing provisions for the delivery of the stock to the purchaser upon payment of the purchase price, and for the surrender of the stock to the depositors in the event of default in the payment of the purchase price. The purchaser made default, and one of the depositors then called upon the bank to make a distribution or division of the shares represented by the certificates among the depositors according to their respective interests, and to procure from the mining company and deliver to the demandant a separate certificate for his interest. The bank did not comply with the demand, and thereupon the demandant sued it for conversion. *Held*, upon full consideration of the terms of the contract and of the rules of interpretation before stated, that it did not impose upon the bank the duty of distributing or dividing the stock among the several co-owners, or of procuring for and delivering to each a separate certificate for the shares to which he might be entitled, as between himself and his co-owners, and that therefore the bank's failure to comply with the demand did not constitute a conversion of the demandant's interest in the stock.

In Error to the Circuit Court of the United States for the District of South Dakota.

Carle Whitehead (Robert C. Hayes and William B. Shattuc, on the brief), for plaintiff in error.

Norman T. Mason (Eben W. Martin, on the brief), for defendants in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

VAN DEVANTER, Circuit Judge. This was an action of trover against the First National Bank of Deadwood, S. D., and the Oro Hondo Gold Mining Company for the alleged conversion of a large

number of shares of the capital stock of the mining company claimed by the plaintiff, Thomas Christian. At the trial, which was to a jury, the evidence, without any conflict, established these facts: The plaintiff and 11 other co-owners of less than the entire number of shares, represented by three stock certificates issued by the mining company, deposited the certificates with the defendant bank for the purposes and upon the terms named in the following agreement:

(1) This envelope contains two million, one hundred and twenty thousand (2,120,000) shares of the capital stock of the Oro Hondo Mining Company, evidenced by certificates as follows, to wit: Certificate No. 19, for five hundred and five thousand (505,000) shares, certificate No. 20 for seven hundred and fifty-seven thousand five hundred (757,500) shares, certificate No. 21, for seven hundred and fifty-seven thousand five hundred (757,500) shares, of the par value of one dollar per share; which said certificates of stock are issued to George M. Nix, and by him assigned in blank.

(2) One million, nine hundred ninety-eight thousand eight hundred and eighty (1,998,880) shares of said stock belong to the parties named below, signing this escrow, and are placed by the undersigned in escrow with the First National Bank of Deadwood, South Dakota, upon the following terms and conditions:

(3) All of said stock may be purchased by said George M. Nix for the sum of ninety-nine thousand nine hundred and forty-four (\$99,944.00) dollars, less a commission of ten (10%) per cent. to be paid to said George M. Nix as payments are made upon this escrow.

(4) On or before the 1st day of April, 1903, the said George M. Nix or his assigns must pay all of the parties signing this escrow, except himself, or deposit to their order in the First National Bank of Deadwood, South Dakota, the sum of twenty-two thousand, four hundred eighty-seven and forty one-hundredths (\$22,487.40) dollars, and shall then have the privilege of withdrawing twenty-five (25%) per cent. of said stock so deposited belonging to the signers of this escrow, four hundred ninety-nine thousand seven hundred (499,700) shares, or certificate No. 19, for five hundred and five thousand (505,000) shares.

(5) Within six months from said 1st day of April, 1903, the said George M. Nix or his assigns must pay thirty-seven and a half (37½%) per cent. of eighty-nine thousand, nine hundred forty-nine and sixty one-hundredths (\$89,949.60) dollars, or thirty-three thousand and seven hundred thirty-one and ten one-hundredths (\$33,731.10) dollars, and may then withdraw seven hundred forty-nine thousand and five hundred and fifty (749,550) shares of said stock, or certificate No. 20 for seven hundred fifty-seven thousand five hundred (757,500) shares deposited in escrow.

(6) Within one year from the said 1st day of April, 1903, said George M. Nix or his assigns, must pay thirty-seven and a half (37½%) per cent. of said eighty-nine thousand, nine hundred forty-nine and sixty one-hundredths (\$89,949.60) dollars, or thirty-three thousand seven hundred thirty-one and ten one-hundredths (\$33,731.10) dollars, and may then withdraw the balance, to wit: Seven hundred forty-nine thousand, five hundred and fifty (749,550) shares of said stock so deposited in escrow, or the third certificate, No. 21, for seven hundred fifty-seven thousand, five hundred (757,500) shares of stock.

(7) It is understood that the extra one hundred twenty-one thousand one hundred and twenty (121,120) shares of stock deposited in escrow are the property of George M. Nix, the certificates having erroneously been made out for a larger amount of stock than the agreement with the signers of this escrow calls for, by reason of a mistake in the acreage of the ground.

(8) In case said George M. Nix or his assigns does not carry out the conditions of this escrow in reference to work to be done on said ground, as specified in the contract with said signers of the escrow, made on the 18th day of March, 1902, or payments provided for herein shall not be made, then all rights under this escrow shall cease and determine, and said parties depositing said stock may withdraw the same from said First National Bank of Deadwood, and shall be the owners thereof as shown by the schedule marked

'Exhibit A' hereto free of any option upon the same by the said George M. Nix, or his assigns.

(9) In case any payments shall be made by said George M. Nix or his assigns to the undersigned parties and the future payments provided for herein shall not be made, then all rights of said George M. Nix or his assigns to any future delivery of stock shall cease and the undersigned parties may withdraw said stock from said bank as above provided.

(10) Time is of the essence of this contract.

(11) All moneys deposited with said bank as above provided shall be paid over by the said bank to the several parties entitled thereto as shown by the schedule marked 'Exhibit A' hereto attached and made a part of this agreement.

(12) In case any of said payments shall not be made, the stock shall be delivered to the parties named in said Exhibit A and be the property of said parties; twenty shares of stock to be delivered for each dollar to be paid the said parties.

Dated Deadwood, South Dakota, this 16th day of January, 1903.

Exhibit A.

Each payment as it shall be made shall be by said bank apportioned and paid over to the following named parties or deposited to the credit of said parties in the following amount to wit:

Name of Persons to Whom Payments are to be Made.	1st Payment Less 10%.	2d Payment Less 10%.	3d Payment Less 10%.	Total.
Susie B. Moore.....	\$ 770 60	\$ 1,155 87	\$ 1,155 87	\$ 3,082 34
Pat J. O'Brien.....	770 60	1,155 87	1,155 87	3,082 34
Thomas Burke	770 60	1,155 87	1,155 87	3,082 34
James Cusick	7,419 95	11,129 94	11,129 95	29,679 84
Thomas Christian	6,804 12	10,206 19	10,206 19	27,216 50
B. F. Atkins.....	910 25	1,365 39	1,365 19	3,640 85
Charles Hegberg	455 10	682 76	682 77	1,820 63
Ed A. Dryer.....	2,518 00	3,777 01	3,777 01	10,072 01
Frank Abt	498 60	747 90	747 90	1,994 40
R. H. Purcell.....	498 60	747 90	747 90	1,994 40
A. D. Wilson.....	615 83	923 75	923 76	2,463 34
Charles J. Swanstrom.....	455 15	682 75	682 75	1,820 65
George M. Nix.....	2,498 60	3,747 81	3,747 77	9,994 18

The agreement was signed by the plaintiff and the other co-owners of the shares intended to be sold, but was not signed by Nix, the bank, or the mining company.

In this connection it may be observed that there are several mistakes in the agreement, which, though confusing at first, are obviated when the entire instrument is considered. The number of shares represented by the three certificates is inaccurately stated as 2,120,000, but is shown to have been actually 2,020,000. The number of shares owned by the plaintiff and his co-depositors is stated as 1,998,880 and also as 1,998,800; the former being correct. Nix is spoken of as owning 121,120 shares, but the true number appears to have been 21,120. In Exhibit A, Nix is named as if he were one of those among whom the specific payments of \$22,487.40, \$33,731.10, and \$33,731.10 provided for in paragraphs 4, 5, and 6 were to be divided; but a computation of the amounts there apportioned to the plaintiff and his co-depositors shows that the whole of these payments would be exhausted before reaching Nix's name. As these specific payments were unquestionably the net purchase price of the shares of the plaintiff and his co-depositors, after deducting the commission allowed to Nix by paragraph 3, and as the

last line of Exhibit A must be regarded as a mere statement of Nix's commission, the rule stated in paragraphs 8, 9, and 12 for measuring the interests of the plaintiff and his co-depositors in such of the stock as might not be sold is not well expressed, unless it was intended that Nix should have a commission or interest in such shares as he might fail to purchase, which is both improbable and contrary to the provisions of paragraphs 3, 8, and 9. It was doubtless meant that the plaintiff and his co-depositors should own 20 shares of the stock not sold for each dollar of the gross purchase price not paid or earned as a commission.

Pursuant to paragraph 4, Nix paid the first installment of \$22,487.40, being 25 per cent. of the gross purchase price, less a corresponding proportion of his commission, and withdrew from the bank certificate No. 19 for 505,000 shares. The time for paying the second installment was then extended to January 1, 1904, when Nix made default and so lost all rights to further avail himself of the option. Thereupon the plaintiff, acting independently of his co-depositors, made a demand of the bank, which, as interpreted by his counsel, called upon the bank to surrender the original certificates, Nos. 20 and 21, to the mining company, to cause new certificates to be issued in such manner as would permit the remaining shares to be divided among their owners according to their respective interests, and then to deliver to the plaintiff a separate certificate for his portion. The demand was not complied with; and, if the bank was obligated to thus divide the remaining shares among the several co-owners and to deliver to each a separate certificate for his portion, the circumstances surrounding the demand were such that the bank was guilty of a conversion of the plaintiff's portion, otherwise compliance with the demand was rightly refused, and there was no evidence of a conversion. As respects the mining company, there was an entire absence of evidence of any act of commission or omission on its part violative of or inconsistent with the rights of the plaintiff.

At the conclusion of the evidence, the court ruled that the terms of the agreement were not such as to obligate the bank, upon Nix's default, to divide the remaining shares among the several co-owners, and to deliver to each a separate certificate for his portion, but merely required it to return the original certificates, Nos. 20 and 21, to the plaintiff and his co-depositors, from whom they were received, and that the plaintiff, acting independently of his co-depositors, was not entitled to the possession of them. Under the court's instruction, the jury then returned a verdict for the defendants, and, judgment having been rendered thereon, the plaintiff sued out the present writ of error.

As Nix, who owned some of the shares represented by the certificates, assented to the terms of the agreement by accepting some of its benefits, and as the bank also assented thereto by accepting the duties of depositary thereunder, the decisive question presented for our consideration is: Did the agreement, rightly interpreted, require the bank, upon the default of Nix, to divide the shares represented by the two remaining certificates among the several co-owners according to their respective interests and to procure for and deliver to each a certificate representing his portion? If it did, it not only enjoined upon the de-

positary duties which were unusual, but also attached to its office responsibilities which were disproportionate to any advantages which could reasonably have been expected to accrue to it therefrom. There was no express arrangement for its compensation, and not only did paragraph 11 and Exhibit A expressly require it to promptly pay over to the plaintiff and his co-depositors "all moneys" received by it in payment for their stock, but paragraphs 4, 5, and 6 left it altogether uncertain whether any of the moneys would even pass through its hands, should Nix avail himself of his option to purchase. As is said by Schouler, in his work on Bailments ([3d Ed.] §§ 58, 63), "the courts are indisposed to extend, by inference, the perils of an unprofitable trust," and "every bailee without reward ought to be given the least trouble consistent with his actual undertaking." This is in keeping with the rule that, when a contract is fairly open to two constructions, it is legitimate to adopt the one which equity would favor. *Washington, etc., Co. v. Coeur d'Alene, etc., Co.*, 160 U. S. 77, 101, 16 Sup. Ct. 239, 40 L. Ed. 355.

The circumstances surrounding the making of the agreement were these: The certificates had been issued in the name of Nix and had been by him assigned in blank. They were in the possession of the plaintiff and his co-depositors, who were giving Nix an option to purchase their shares. To protect each party against any intervening act of the other, as also for their mutual convenience, it was deemed proper to place the certificates in the custody of a depositary to abide the action of Nix under the option contract. The certificates were not formally assigned to the bank, and it was not even nominally made the owner of the shares. The original conditions therefore could be restored, if Nix made default, by a mere redelivery of the certificates to those from whom they were received. The bank was in no better position to divide the shares and obtain new certificates than were the owners. Indeed, its place of business was at Deadwood, S. D., and the mining company was a Colorado corporation, whose principal offices, including that for the transfer of stock, were presumably in the latter state. Thus the situation at the time suggests no reason why the bank should have been charged with dividing the shares and obtaining new certificates, in the event of Nix's default.

The language of the agreement is that of the plaintiff and his co-depositors, and, if there be any doubt as to its true meaning, it is both just and reasonable that it should be construed most strongly against them. *Noonan v. Bradley*, 9 Wall. (U. S.) 394, 407, 19 L. Ed. 757; *Texas & Pacific Ry. Co. v. Reiss*, 183 U. S. 621, 626, 22 Sup. Ct. 253, 46 L. Ed. 358; *Osborne v. Stringham*, 4 S. D. 593, 57 N. W. 776.

Of course, effect must be given to the intention of the parties, and, if that is made plain and certain by the agreement, every part of it being duly considered, the considerations and rules of interpretation to which we have referred are without application.

Turning to the agreement, we find that, in respect of moneys deposited with the bank in payment for the stock of the plaintiff and his co-depositors, it is directed with much particularity, in paragraph 11 and Exhibit A, that they shall be "by said bank apportioned"

among and paid over to the "several" parties entitled thereto; the amount to be paid to each being precisely stated. But, in respect of the disposition of the certificates to be made by the bank, in the event of Nix's default, it is said, in paragraph 8, "said parties depositing said stock may withdraw the same from said First National Bank of Deadwood, and shall be the owners thereof as shown by the schedule marked 'Exhibit A' hereto." And in paragraph 9: "The undersigned parties may withdraw said stock from said bank as above provided." These paragraphs, it will be observed, do not charge the bank with the division of the shares among the several parties entitled to them, but plainly contemplate that it shall merely permit the depositors to withdraw what they deposited with it, the certificates. Thus a distinction is reasonably and clearly drawn between the moneys, which would be readily capable of division by the bank, and the certificates, which could not be divided without the assistance of the mining company, over which the bank had no control. And that it was intended that the bank should not be troubled with making any change in the certificates is further indicated by the fact that no provision was made for segregating the shares of Nix, named in paragraph 7, from the others during the life of his option, and also by paragraph 4, which authorized the bank to surrender certificate No. 19 for 505,000 shares upon the payment of the purchase price of 499,700 shares, and by paragraph 5, which authorized it to surrender certificate No. 20 for 757,500 shares upon the payment of the purchase price of 749,550 shares. Without any doubt or uncertainty, the several paragraphs and provisions which we have mentioned, unless modified by another, contemplated that the bank should deliver to Nix or redeliver to the depositors, as the one or the other might become entitled thereto, the identical certificates deposited with it.

We are thus brought to paragraph 12, upon which the plaintiff chiefly relies, which reads:

"In case any of said payments shall not be made, the stock shall be delivered to the parties named in said Exhibit A and be the property of said parties; twenty shares of stock to be delivered for each dollar to be paid the said parties."

It is difficult to harmonize this paragraph with other provisions of the agreement. The parties named in Exhibit A are not identical with those authorized by paragraphs 8 and 9 to withdraw the stock from the bank, upon the default of Nix, for he is not one of the latter, and yet is named in Exhibit A. Again, while other paragraphs show unmistakably that he was not to have any right to any of the stock of the plaintiff and his co-depositors, save as he should pay for it, this paragraph, if given full effect as it is written, would entitle him, in the present situation, to 149,911.60, or possibly 149,916, shares of their stock without pay.

It is apparent, we think, that resort must be had to interpretation to remove the doubt and uncertainty cast upon the meaning of the agreement by this paragraph. While the reference to Exhibit A seemingly includes Nix among those to whom the stock was to be delivered, what follows equally indicates that he is not included, for

it says "twenty shares of stock to be delivered for each dollar to be paid the said parties." He had no interest in the stock to be sold and was not one of those to be paid. Although entitled to a commission of 10 per cent. on the gross purchase price, in the event and to the extent that he availed himself of the option to purchase, he was plainly not entitled to any commission or payment in respect of stock not sold. The reference to Exhibit A must therefore be understood as not including him, and therefore as directing a delivery to the other parties named in the exhibit, who are identical with those designated in paragraphs 8 and 9 as the "parties depositing the said stock" and "the undersigned parties." This view is also strengthened by the fact that the measure so prescribed for determining the interest of the depositors in the stock not sold—that is, 20 shares for each dollar to be paid—is the precise rate at which the gross purchase price was fixed, for by paragraphs 2 and 3 the depositors agreed to sell to Nix their 1,998,880 shares for \$99,944.

Unlike the provisions relating to the disposition of moneys paid into the bank, this paragraph does not in terms direct an apportionment among the depositors, but only the delivery of the stock to "the parties named in said Exhibit A"—meaning the depositors. It does not say that the stock shall be delivered to them severally, or that 20 shares shall be delivered to each for each dollar to be paid to him, but simply refers to them in a collective way as do paragraphs 8 and 9. But, as there would necessarily be more than enough stock to fill the measure of 20 shares for each dollar to be paid to the depositors, and as the excess would necessarily be all or part of the 21,120 shares owned by Nix as stated in paragraph 7, it is urged that it could not have been intended that his shares should be delivered to the depositors or become their property, and therefore that it must have been intended that the bank should divide the stock and procure for and deliver to the several owners new certificates representing the shares to which they would be respectively entitled. There is some color for the contention, but we think it is not sound. Of course, it was not intended that the depositors should become the owners of Nix's shares any more than that he should become the owner of theirs without pay; but it does not follow that the original certificates representing the shares of both were not to be redelivered to the depositors from whom they were received. He had assented to the inclusion of his shares in these certificates, had indorsed upon the latter an assignment in blank, and had intrusted them to the possession and keeping of the depositors before they were delivered by the latter to the bank. He also assented to the terms of the agreement, although it contained no provision for the delivery to him of his shares save as he might by making the prescribed payments become entitled to the original certificates. In these circumstances, it is quite reasonable to believe that he was content to look to the depositors, to whom alone the agreement directs a redelivery, for a segregation of his stock in the event that through his default the certificates should be returned to them. Had there been a purpose to impose upon the bank the unusual duty of dividing the stock and procuring for and delivering

to the several owners new certificates for the shares to which they would be respectively entitled, it doubtless would have been plainly stated; but, as such an intention is not expressed, or even necessarily implied, we think the considerations and rules of interpretation before mentioned require that whatever doubt or uncertainty may exist in that regard should be resolved in favor of the bank, and that it must be held that no such duty was imposed.

Our conclusion is that the plaintiff was not entitled to demand that the bank divide the remaining stock among the several co-owners, or that it deliver to him alone the remaining certificates, and that therefore no conversion was shown, and a verdict against him was rightly directed.

The judgment is accordingly affirmed.

(155 Fed. 712.)

BELL v. NORTH AMERICAN COAL & COKE CO.

(Circuit Court of Appeals, Sixth Circuit. June 18, 1907. On Rehearing, October 15, 1907.)

No. 1,636.

1. WASTE—NATURE OF REMEDY—EQUITY.

Equity has jurisdiction of a suit to restrain waste by the cutting and removal of valuable timber, and incidentally for an accounting for waste already committed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waste, § 16.]

2. ADVERSE POSSESSION—POSSESSION BY TENANT—EXTENT.

When a tenant is placed in possession of a definite part of a larger tract of land, the possession will not avail the landlord beyond the part so claimed and held; but, if one claiming under an assurance of title defining boundaries place a tenant in possession without limiting him to any definite part, the tenant's possession will extend to the landlord's boundaries, although the land actually occupied is but a small part of the whole.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 585.]

3. SAME—TENNESSEE STATUTE.

Under Shannon's Code Tenn. § 4456, possession of land under assurance of title, if continued for seven years, operates not only to bar an action on a superior title, but to divest that title and vest it in the adverse holder; but, on the other hand, possession without color of title continued for seven years gives a mere right to defend against the title so long as the possession is actual and continuous, under section 4458, which provides that no person shall have any action for any lands, but within seven years after the right of action has accrued, and such right is lost the moment the possession is abandoned. Hence, under such statute as construed by the Supreme Court of the state, where one in possession of land without color of title attorned to another who had made entry from the state of a definite tract, including his own, and agreed to hold possession of the whole for his landlord, the effect was an abandonment of his own possession, and from that time his possession was that of his landlord and referable to the entry, and extended to the whole tract, although there was no extension of his actual inclosure.

[Ed. Note.—State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

On Rehearing.

4. PUBLIC LANDS—ENTRY OF STATE LANDS—TENNESSEE STATUTE.

The provision of Acts Tenn. 1824, c. 22, § 6, making unlawful an entry of state land on which another resided or which was occupied by him,

unless he was given 30 days' notice, was intended solely for the protection of the occupier, by enabling him to exercise his prior right to enter the land; and an entry made without giving such notice to an occupier of part of the land is void only as to such part. The notice might, moreover, be waived by an occupier, and was so waived in a case where for a valuable consideration he agreed to attorn to the entryman and hold possession for him until the grant was secured.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

John F. McNutt, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. This is a bill to restrain trespass and quiet title to a large tract of mountain land lying in Cumberland county, Tenn. The complainant asserted title and possession of the lands included in several grants issued originally to Thomas B. Eastland, under whom by mesne conveyances the complainant claimed. These grants were from the state of Tennessee, and bore date of 1836. The bill averred that the defendant, Bell, claimed the lands included within grants Nos. 12,758, 12,769, 12,770, and 12,771, being junior grants, within the boundaries of senior grants to Eastland. It was averred that the defendant was trespassing by cutting valuable timber and removing same to the irreparable injury of the lands. It also charged that the defendant was insolvent. The answer disclaimed any title or interest in the lands claimed by complainant outside the limits of grant No. 12,771, issued May 26, 1874, to defendant, containing, by survey, 1,077 acres. It denied that the complainant had any possession of the lands inside said grant, denied that he was now or had been cutting timber from said land "for a long time," and denied insolvency. The answer asserted an actual adverse possession of the lands within said grant beginning at date of its survey made in March, 1872, and pleaded and relied upon the Tennessee statute of limitations of seven years. The court below found that jurisdiction existed because of the repeated trespasses of the defendant, and that the title of the complainant was the superior title to the lands included within the grant to defendant of 1874, except as to a parcel of 100 acres inside of said grant, designated as the "Bolin Survey," which said 100 acres had been held adversely for more than seven years under color of title by said Bolin or those who held under him.

There was evidence showing that the defendant had cut and removed valuable timber from the lands included within his junior grant. The extent of this cutting does not appear, but sufficient is shown to justify the assumption of jurisdiction for the purpose of enjoining trespass and an accounting. The case on its facts falls within *Peck v. Ayers & Lord Tie Co.*, 116 Fed. 273, 53 C. C. A. 551.

Complainant's title, being under the elder grants, must prevail, unless, through adverse possession under his junior grant, the latter has become the better. Beyond the possession called the "Bolin possession" neither party has had any such open, notorious, and continuous adverse possession within the interlap of the conflicting grants as will

affect the results. The case must turn here, as it did below, upon the extent, character, and effect of the Bolin possession. The facts, as we find them, which bear upon this possession, are these: Under an entry made March 14, 1872, by one Jackson, assignor of Bell, the latter made a survey preliminary to applying for a grant. Upon this survey, dated March 18, 1872, a grant duly issued to Bell, dated May 26, 1874, for 1,077 acres, more or less, being the grant under which Bell claims title. This grant overlaps parts of two of complainant's Eastland grants. When Bell made this survey he found one Samuel Bolin living within the lines of his survey. Bolin had a house and barn, an orchard of grown apple trees, and about 15 or 20 acres in cultivation. The precise beginning of Bolin's occupation is not shown, but enough appears to show that Bolin had lived upon his occupation, claiming and holding it for himself for as much as 10 to 15 years. The evidence seems to establish that his original possession was taken under a parol arrangement with one Brown, who claimed to own lands in the vicinity. It turned out, however, that, if this was so, Bolin did not plant himself upon any land claimed or owned by Brown, and it is certain he had no deed or other instrument from Brown or any one else which would constitute color of title under the Tennessee statute of limitations. When Bell found Bolin within the Jackson entry and within the lines of his survey, he made an arrangement with him by which he attorned to Bell and agreed to hold for Bell the entire body of land described by the Bell survey and perfect Bell's title for him. Bell, upon his part, agreed that when, through such possession, his title should be made good, he would for a nominal consideration convey to Bolin 100 acres, which should include his occupation. That Bolin might know the lines of the 100 acres, it was then run out and a certificate of survey, made and signed by him as surveyor, given to Bolin. Bolin's possession covered lands within each of the two adjacent grants of complainant which constitute its superior legal title. The learned circuit judge seemed to doubt the scope of the agreement between Bell and Bolin, but we find from the direct testimony of Bell and the subsequent admissions of Bolin, now dead, that the distinct understanding of both parties was, as we have stated it above, and that from that time, the date being fixed by date of the survey in March, 1872, Bolin held and claimed to be holding the Bell grant for Bell, and that when Bell's title should be made good he was to have a deed to 100 acres. When a tenant is placed in possession of a definite part of a larger tract of land, the possession will not avail the landlord beyond the part so claimed and held. If, however, one claiming under assurance of title defining boundaries, place a tenant in possession without limiting him to any definite part, the tenant's possession will extend to the landlord's boundaries, although the land actually occupied will be but a small part of the whole. *Treece v. American Ass'n*, 122 Fed. 598, 58 C. C. A. 266; *Ross v. Cobb*, 9 Yerg. (Tenn.) 463; *Massengill v. Boyles*, 11 Humph. (Tenn.) 113; and *Elliott v. Pearl*, 10 Pet. 443, 9 L. Ed. 475. But it is said that before Bolin attorned to Bell he had for more than seven years been in the open, continuous, and adverse possession of some 10 to 20 acres

of this land, and that he did not after agreeing to hold for and under Bell extend his actual possession beyond his original occupation, and that for this reason his subsequent possession as Bell's tenant did not inure to Bell's benefit beyond the inclosures. The argument is that Bolin had already acquired a defensive right of possession to the land actually inclosed by virtue of the second section of the Tennessee act of 1819, now section 4458, Shannon's Tenn. Code, which provides that:

"No person, or anyone claiming under him, shall have any action, either at law or in equity, for any lands, tenements, or hereditaments, but within seven years after the right of action has accrued."

A possession without color of title, though continued for seven years, does not vest title, but is a mere right to defend against the title so long as the possession is actual and continuous, and it is lost the moment possession is abandoned. *Marr v. Gilliam*, 1 Cold. (Tenn.) 490, 510; *Crutsinger v. Catron*, 10 Humph. (Tenn.) 24. On the other hand, possession under assurance of title defining the metes and bounds extends the possession to the bounds, and, if continued for seven years, operates not only to bar an action by the superior title, but to divest that title and vest it in the adverse holder. Shannon's Tenn. Code, § 4456; *Bleidorn v. Pilot Mountain C. & M. Co.*, 89 Tenn. 166, 15 S. W. 737; *Tenn. & Pacific Ry. v. Mabry*, 85 Tenn. 47, 1 S. W. 511. It is well settled by the Tennessee decisions that, if one go into possession under color of title and hold for seven years, and thereafter acquire an assurance of title to a larger tract which includes the smaller, a possession continued within the bounds of the smaller parcel, without an extension outside of its limits, will not be a possession under the new grant or other assurance of title. In such case a continual possession will be referable to the original assurance of title only. The reason is that, so long as the adverse possessor confines himself to the limits of the smaller parcel to which he has acquired title by adverse possession under color, there would be no actual invasion of the title and right of the superior title to the lands outside of that parcel, but a possession consistent with the adverse possessor's legal rights. *Smith v. Lee*, 1 Cold. (Tenn.) 549, 552-3; *Peck v. Houston*, 5 Lea, 227; *Coal Creek Co. v. Ross*, 12 Lea, 1, 9; *Bon Air Coal Co. v. Parks*, 94 Tenn. 263, 29 S. W. 130. But this principle is not applicable when the original adverse possession of the smaller parcel was not under an assurance of title defining metes and bounds. Bolin did not become vested with any title by reason of his occupation before Bell's grant issued. He had at most a mere naked possessory right which would be lost by abandonment. When, therefore, he ceased to claim for himself and attorned to Bell, and there was no reason why he should not do so, however great his folly in building up a title for another when he might have ripened a title for himself by taking out a grant or obtaining some assurance purporting to convey title, Bolin's possession became thereafter the possession of Bell, and, from the date of Bell's subsequent grant, a possession of the entire grant, although there was no extension of his actual inclosure. This distinction, whether a good one or a bad one, is clearly the law of Tennessee, and was made and enforced in the case of *Bon Air Coal Co. v. Parks*,

cited above. In that case, as in this, the defendant, Parks, went originally into possession of a part of the land in litigation, not under color of title, but as a mere trespasser, and inclosed and cultivated some 40 or 50 acres for more than seven years. He then made an entry of 1,175 acres, which include this original occupation and remained in possession under this entry, without extending his actual possession, for another period of more than seven years, when he obtained a grant. A possession under an entry, although not an assurance of title, will, if sufficiently definite to point out the land intended to be appropriated, be protected under the second section of the act of 1819 (Shannon's Code, § 4458), to the extent of its calls. *Ramsey v. Monroe*, 3 Sneed (Tenn.) 329.

As the defendant in the *Bon Air Case* had not had possession long enough under his grant to avail him unless he could connect his possession under his entry, the question arose whether he had had any possession under that entry outside of his actual possession which would avail him as a defense. For the complainant it was contended, there as here, that defendant had never extended his possession beyond his original inclosures, and that when he took out his entry, which included his original inclosures, he had acquired a right of possession and could not have been ejected by the owner of the title. But it was held that, as the prior possession had not been under color of title or any document defining the limits of his possession, his subsequent possession would be referable to his entry and be a possession coextensive with the limits defined by that entry, and the case distinguished from the cases relied upon to prevent such a result by the fact that in each of them the prior possession had been under color of title. This case is indistinguishable in principle from the one at bar, and must be controlled by it.

The result is that the decree of the court below must be reversed, with direction to dismiss the bill.

On Rehearing.

This case comes on now upon a petition to rehear. Acts Tenn. 1824, c. 22, § 6, provides as follows:

"Be it enacted, that, hereafter, it shall not be lawful for any person to enter any land, in any of the entry-takers' offices, established by the act to which this is a supplement, on which land another resides, or cultivated by another, until such person shall have given, in writing, at least thirty days' previous notice, to the person residing on, or cultivating, said land, of his intention to enter the same: and any entry made, or grant obtained, contrary to the provisions of this section, shall be utterly void in law and equity."

It is now insisted that no notice was given to Bolin as occupier in possession at the date of the entry and survey upon which Bell's grant issued, as required by the act quoted above, and for this reason Bell's grant is null and void. The whole purpose of the act of 1824 was to apprise the occupier of an intention of entering the land, that he might avail himself of his right to secure it to himself by making first entry. *Wilson v. Hudson's Lessee*, 8 Yerg. (Tenn.) 398, 410. Neither does the object or the purpose of the act require that the grant shall be held void to any greater extent than the actual occupa-

tion existing at the time of the entry. It is therefore well settled that an occupier without color of title is protected by the act of 1824 only to the extent of the land actually occupied and inclosed, and that the grant is perfectly valid outside of such occupancy. *Den v. Nixon*, 10 Yerg. (Tenn.) 518; *Horn v. Childress, Meigs* (Tenn.) 102; *Smith v. Lee*, 1 Cold. (Tenn.) 549; *Peck v. Houston*, 5 Lea (Tenn.) 227, 230. Nevertheless, if the Bell grant is void to the extent of Bolin's actual occupancy, he must fail in his defense, for he has had no actual occupation outside of the Bolin occupancy. There is no evidence of a written notice to Bolin of intent to enter the land included in Bolin's inclosure; but there is abundant evidence that Bolin knew that Bell was making a survey with a view to either exclude his inclosed land from an entry made or to be made for Jackson, and that with this knowledge that he made an agreement with Bell by which his occupancy was to be included in the entry grant, and by which he was to remain in possession and hold the entire grant for Bell. The requirement of the act of 1824, as well as of subsequent acts upon the same subject, that one proposing to make an entry of public lands shall give 30 days' written notice of his intent to any person in actual occupation, being exclusively for the benefit of the occupier, may be waived by him. *Wilson v. Hudson* and *Horn v. Childress*, both cited above. The facts disclosed by this transcript make a plain case of waiver of written notice.

The evidence does not make it clear whether Bolin's attornment to Bell was made before or after the Jackson entry. The Bell grant recites the Jackson entry as having been made March 14, 1872, and the survey as made March 18, 1872. But it is plain a survey was made prior to Jackson's entry, for the land entered is described precisely as in the grant. Counsel for the North American Coal Company, in their original brief, took the position that the entry was not in fact made until after a survey by Bell. This they concluded from a correspondence of the description in the entry with that in the survey and from the fact that the survey of 100 acres for Bolin made by Bell describes this 100 acres as being within an earlier entry made by Armstrong Martin, and does not mention or refer to any entry made by Jackson. In this conclusion we concur. The certificate of survey given by Bell to Bolin is not dated, and we infer that prior to the actual date of Jackson's entry Bell made his survey for an entry to be made by Jackson, and at the same time ran out 100 acres for Bolin, which included Bolin's occupancy. Subsequently Jackson's entry was made, and then a certificate of survey from the lines previously run was filed, in order to comply with the statute and procure a grant. We therefore conclude that prior to Jackson's entry Bolin was apprised that Bell's purpose in making a survey was to enter the lands surveyed in Jackson's name. Bell testified that his purpose was to exclude from Jackson's proposed entry all lands which he should find actually occupied by a settler. That he would have excluded Bolin's occupancy, but for the agreement he made with him, there is no reason to doubt. That agreement was conditional upon his obtaining an assignment from Jackson of the entry to be made in his name, that Bolin should remain upon and hold under Bell until Bell's title should become

the best title, and that also Bolin would pay him a small agreed sum as his proportion of the expense of the survey. Bolin from the time of that agreement held continuously for Bell for a period of more than seven years after date of Bell's grant and before suit brought. This agreement induced Bell to include Bolin's occupancy with the entry and grant under which he claims, and also induced him to go on and obtain an assignment from Jackson of his entry, and to obtain a grant, and finally to convey to Bolin's heirs 65 acres, including Bolin's occupancy, after Bolin's possession had, as he supposed, ripened his title under his junior grant. That he conveyed only 65 acres, instead of 100 acres, to Bolin's heirs, is of no consequence to the defendant in error here. He justifies his breach of good faith by claiming that Bolin did not pay him the whole of the little sum that he owed as his proportion of the cost of the survey of the 100 acres. He may not be clear of liability to Bolin's heirs for his failure to convey the remainder of the 100 acres he agreed to convey. But that may be set on one side as of no moment in this case; Bolin's heirs not being before the court. This agreement made by Bolin with the knowledge of the purpose of Bell to procure a grant which would include his occupancy operates as an estoppel, and in law was a waiver of the written notice required under the act of 1824. If thereby Bolin estopped himself to rely upon want of notice as a defense against Bell's subsequently acquired title, it is plain that third persons can stand in no better position.

Upon another ground the result would be the same. The agreement between Bell and Bolin, in substance and legal effect, was a sale of his occupant right upon a sufficient consideration, and operated to extinguish it or pass it to Bell, we need not say which. That it was in parol was of no fatal consequence. In Tennessee a parol sale of lands is merely voidable, and not void. Third parties will not be allowed to object to a parol contract which the parties between themselves consider operative and valid. *Brakefield v. Anderson*, 3 Pickle 87 Tenn. 206, 211-212, 10 S. W. 360; *King v. Coleman*, 98 Tenn. 561, 571, 572, 40 S. W. 1082. This question as to the act of 1824 was not made in the court below, nor was it mentioned in the opinion of Judge Clark, nor in the opinion heretofore handed down by this court; but it might have been made, and we have, therefore, given it consideration, with the result that we find Bolin's right as occupier was waived at the time of the survey and the agreement subsequently carried out by the parties.

The other grounds presented for a rehearing are a mere reargument of the points already decided.

Petition will be dismissed.

(155 Fed. 833.)

AARON V. UNITED STATES et al.

(Circuit Court of Appeals, Eighth Circuit. June 29, 1907.)

No. 2,161.

1. INJUNCTION—PERSONS BOUND—MISNAMING OF DEFENDANT.

The fact that a defendant's first name was stated incorrectly in the pleadings, decree, and an injunction order does not relieve him from liability for contempt for violation of such order, where he was in fact served with process or appeared, and the circumstances were such that he could not have been misled as to the person intended.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 439-441.]

2. CONTEMPT—SUFFICIENCY OF INFORMATION.

The information in a proceeding for contempt is sufficient, if it clearly apprises the defendant of the nature of the charge against him, and no particular form is essential.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, § 146.]

3. INJUNCTION—VIOLATION—CONTEMPT—PLEADING.

A petition or motion for the attachment of a defendant for contempt in violating an injunction, which is entitled as in the original suit, and refers to the order of injunction granted therein by its date, and sets out in detail the alleged acts of violation, is sufficient, and need not set out the order in terms.

4. CONTEMPT—INFORMATION—OBJECTIONS TO SUFFICIENCY—WAIVER.

Where a party charged with contempt appears and goes to trial without objection to the sufficiency of the information and affidavits by appropriate motion, such objection is waived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, § 147.]

5. ATTORNEY AND CLIENT—AUTHORITY OF ATTORNEY—PRESUMPTION.

The entry of appearance for a defendant by an attorney is presumed to have been authorized, and, to relieve himself from the effect of such appearance, such defendant has the burden of proving to the satisfaction of the court that it was unauthorized.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, §§ 94, 95.]

6. WITNESSES—PRIVILEGED COMMUNICATIONS—LETTERS FROM ATTORNEY TO CLIENT.

A letter written by an attorney to his client, advising him of the terms of an injunction granted against him in a suit in which the attorney is employed, is not a privileged communication, since it contains nothing in the way of a confidential disclosure, and it is admissible in evidence to show actual notice of the injunction by the client.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 753, 763.]

7. WRIT OF ERROR—FEDERAL PRACTICE—NECESSITY FOR MOTION FOR NEW TRIAL.

A motion for a new trial is not essential in a federal court to entitle a party to a review of the judgment on writ of error by the Circuit Court of Appeals.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

See 128 Fed. 770.

David Goldsmith, for plaintiff in error.

George F. McNulty, James A. Seddon, and R. A. Holland, Jr., for defendants in error.

Before HOOK, Circuit Judge, and PHILIPS, District Judge.

PHILIPS, District Judge. This is a contempt proceeding, in which the plaintiff in error was fined \$250 and costs, growing out of the following state of facts:

In December, 1903, various railroad companies, including the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, filed bills in equity in the United States Circuit Court for the Eastern District of Missouri against several so-called railroad ticket "scalpers," to enjoin them from dealing in that class of tickets being and to be sold by said railroad companies as round-trip tickets to and from the Louisiana Purchase Exposition, at St. Louis. One of the suits by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company was instituted against Bennett Wasserman, Wasserman & Co., a corporation, and A. Aaron et al. The subpoena issued in this case was not served personally on the defendant Aaron; but on the return day the defendants, including Aaron, appeared by counsel, Judson and Green and others, and by written stipulation with complainants' solicitors consented that a temporary injunction be ordered by the court, without prejudice to put in contestation the truth of the allegations of the bill and the right to the relief prayed for on final hearing. Accordingly, on the 29th day of April, 1904, Circuit Judge Adams presiding, the court entered a temporary injunction, enjoining the defendants "and each of them, and also their agents, servants, employes, attorneys and all persons acting by or under their authority or direction, or the authority or direction of either of them, during the pendency of this suit, from buying, selling, dealing in or soliciting the purchase or sale of any signed contract nontransferable reduced rate ticket or tickets, or any part thereof, or any coupon thereof hereafter issued in good faith by said complainant, or by any other connecting railroad company for use over the road or roads of said complainant, its lines or any part thereof, issued on account of the Louisiana Purchase Exposition or World's Fair, to be held in the city of St. Louis, Missouri, in the year 1904, which tickets are by their terms nontransferable reduced fare tickets, and from soliciting, advising or urging persons other than the original purchaser thereof to use or attempt to use said tickets or any part thereof, on any train or trains on any lines of road of said complainant."

On the 30th day of July, 1904, the complainant in said suit presented to the Honorable Walter H. Sanborn, one of the circuit judges of said court, a petition for an attachment in contempt against said Wasserman & Co., Bennett Wasserman, and A. Aaron, for having violated said injunction order. The offense charged consisted in the "scalping" and sale of such ticket sold on behalf of the complainant, by the Erie Railroad Company, at the city of New York, on the 22d day of July, 1904, to one L. Goldman. The defendant, Aaron, made return to the writ by the name of Lewis Aaron, as his true name, and

therein set forth as an answer to the writ: (1) That the information upon which the said order to show cause was granted, as also the affidavits filed in support thereof, failed to show that the said Aaron had been guilty of any violation of the order of injunction theretofore entered in said cause; (2) that said order of injunction was not served upon him, and he had no knowledge of the same or any of the proceedings in the cause theretofore.

The answer further stated and admitted that, as an employé of Wasserman & Co., he, the said Aaron, did undertake to sell the ticket which had been issued to said Goldman, and that being informed that said ticket had not been honored, but had been taken up at the Union Station in the city of St. Louis, subsequently refunded the amount of money, to wit, \$14, which he had previously received from said person, but denied generally the other averments in said information.

The assignments of error are that the information for the attachment is insufficient, for the reason that it does not show service of the order of injunction upon the defendant and knowledge on his part thereof, and because the record fails to show such service; and (2) that there was no competent evidence that the sale of the ticket in question was in violation of the injunction, and that the offer of the ticket in evidence should have been rejected; (3) that the court erred in admitting in evidence the letter written by Mr. Judson.

While the defendant was impleaded by the name of "A. Aaron," the trial court found that there was sufficient evidence to show that sometimes he was known, especially to some of the police force of the city of St. Louis stationed in the vicinity of the office where he conducted his business, by the name of A. Aaron; and there is no ground for permissible contention but that he was the identical Aaron proceeded against in the original bill of complaint, and the person had in view in the contempt proceedings. The evidence shows that he was the only Aaron connected with the business of Wasserman & Co. in the sale of such tickets at St. Louis; that he was the vice president of the company, and the active agent therefor, and the identical Mr. Aaron who obtained from Goldman the ticket in question and sold it to one Ernst F. Barthel. It could not therefore be held that he was misled, or that he was not a party in fact to the proceeding.

The second objection goes to the sufficiency of the petition or motion for attachment. It is urged that the petition is defective in not sufficiently referring to the original bill of complaint and reciting the terms of the injunction order alleged to have been disobeyed. The petition is entitled as in the original bill of complaint. It charges that the defendant violated and disobeyed the temporary injunction heretofore granted by the court against the defendants in the suit, including Wasserman & Co., Bennett Wasserman, and said Aaron, granted on the 29th day of April, 1904, in pursuance of the stipulation entered into by all the parties to the cause. It then sets out with particularity the issuing to, and the purchase of the ticket in question by, said L. Goldman, who traveled thereon from the city of New York to St. Louis, and the purchase thereof by said Wasserman & Co., Bennett Wasserman, and said Aaron, and the sale by them of the return portion of said signed contract of the nontransferable reduced rate rail-

road ticket on the 25th day of July, 1904, at the city of St. Louis, Mo., for the price of \$14, to one Ernst F. Barthel. It then sets out the provisions of the contract on said ticket. The petition was sworn to by one Deppe, alleging that the matters and facts set forth therein are true as he verily believes. It was also accompanied by the affidavits of witnesses, specifically charging the facts upon their own knowledge.

It is now the recognized rule that the information in a contempt proceeding is sufficient if it clearly apprises the defendant of the nature of the charge against him, and no particular form is necessary. *Spelling on Injunctions*, § 1121. As the defendant is alleged to have been a party to the suit and the injunction order, and appeared thereto, he was sufficiently advised of the provisions thereof, and the precise order he was charged to have violated; and the affidavits filed therewith, in support of the writ, fully described the offense. If the information for the writ was defective in matter of form, it should have been taken advantage of by the defendant in proper manner by motion before going to trial. Where the party charged with the contempt appears without objection to the sufficiency of the information and affidavits by appropriate motion, but answers and goes to trial, the objection is deemed as waived. *Davis v. State*, 31 Neb. 252, 47 N. W. 854; *Zimmerman v. State*, 46 Neb. 14, 64 N. W. 375; *People ex rel. Barnes v. Court of Sessions*, 147 N. Y. 295, 296, 41 N. E. 700; *Enc. of Pl. & Prac.* vol. 4, p. 786.

It is further contended that the injunction order was not served on the defendant, and that he had no knowledge thereof. It is conceded that, if the defendant was in court when the temporary injunction was granted, this objection is not good. His contention, however, is that he never authorized Judson and Green, and others, to appear and represent him in the original suit in which the temporary injunction was granted. The authority of an attorney or counsellor to appear in court as the representative of a litigant is no longer required to be expressed by the filing of his warrant of attorney. In the early case of *Osborn v. United States Bank*, 9 Wheat. 738, 830, 6 L. Ed. 204, Chief Justice Marshall expressed the rule, now universally recognized, as follows:

"Certain gentlemen, first licensed by government, are admitted, by order of court, to stand at the bar, with a general capacity to represent all suitors in the court. The appearance of any one of these gentlemen in a cause has always been received as evidence of his authority; and no additional evidence, so far as we are informed, has ever been required. This practice, we believe, has existed from the first establishment of our courts, and no departure from it has been made in those of any state, or of the Union."

Presumptively, therefore, the counsel who appeared for the defendant were authorized to do so, and the burden rested upon him to show to the satisfaction of the court the nonexistence of this authority. *Enc. of Plead. & Prac.* vol. 2, p. 682. Mr. Judson, the leading and active counsel for the defendants in the original suit, testified that he certainly would not have appeared for any defendant without feeling well assured that he was authorized thereto; that there were a large number of like suits instituted by various railroads concerned against the so-called dealers in such alleged transactions; that his law firm was em-

ployed by a committee representing such parties to appear and defend for them; that Bennett Wasserman, the then president of the corporation, of which the defendant, Aaron, was vice president, visited and talked with him about the case. As the defendant was vice president of the company, and its active agent in the purchase and sale of such tickets, it is incredible, in view of the evidence that the public press of the city of St. Louis was publishing and discussing the injunctive proceedings against the "scalpers," that this defendant was not advised by Wasserman of these proceedings. No impartial mind can read the cross-examination of this defendant, with its studied lack-candor, evasive answers, without the conviction that he was rather concealing than telling the whole truth. His conduct connected with the transaction of the sale of the Goldman ticket shows that he was conscious of violating the law and cunningly contriving to evade detection. At the time he sold the ticket to Barthel he directed him to practice a deception on the agents of the railroad company by being cautioned, if questioned by them, to answer that his name was L. Goldman, and that when he left the "scalper's" office not to go direct to the railroad station, but to pass around the corner, so that if any watcher should be standing on the outside of the office he might avoid detection. It is quite evident from the opinion of the learned trial judge who sat in the hearing of this case that he discredited the testimony of the defendant touching this issue of fact, and we are of opinion that he was justified therein.

Moreover, immediately after the granting of the injunctive order, Mr. Judson, as counsel for the defendants, addressed and mailed a letter to said Wasserman & Co., advising it of the granting of the injunction against it, and said Lewis Aaron and others, stating, among other things:

"That the injunctions are against your successors and assigns as well as against your servants and agents. * * * We can only add that while we regret that situation, and have spared no efforts to prevent it, we now feel it our duty to call your attention to the injunction, and to warn you of the very serious consequences of their violation. There is only one course to pursue in the case of an injunction, however erroneous or oppressive it may be; and that is, to obey it until it is set aside."

As the defendant, Aaron, was the active manager in charge of the office of Wasserman & Co., it is asking too much of credulity to believe that such advice coming to that office could have escaped the keen eyes of this wide-awake, active agent. He never complained to Mr. Judson that he was not his counsel.

The admission of this letter in evidence is assigned for error, on the ground that it was a privileged communication. This contention is remarkable for this party to make in view of his denial that the relation of attorney and client existed between him and Judson. He protests too much. Had he conceded that Judson was his counsel, there would have been no occasion for the introduction in evidence of this letter, as Judson's appearance to the suit and consent to the order of injunction would have concluded him as to notice thereof. Having denied such notice, the letter addressed to the company, of which he was vice president and active agent, was competent on the ground that it was a circumstantial fact contributing to the proof of his knowl-

edge that Judson was acting as counsel for him. On the other hand, if he had conceded that Judson was his counsel, the letter was harmless. The letter contained nothing more than information imparted to him by counsel of what the court record itself showed. Such a communication is not within the spirit of the statutory exemption as being privileged. It was not a fact which was communicated by counsel which came to the possession of counsel alone by reason of the relation of attorney and client. The rule of the statute "does not extend to the protection of matter communicated not in its nature private or which cannot properly be termed the subject of a confidential disclosure." *Beeson v. Beeson*, 9 Pa. 301, approved in *Schaaf v. Fries*, 77 Mo. App. 359; *Greenleaf, Ev.* (16th Ed.) § 244.

Other questions are suggested by counsel for plaintiff in error, some of which are not specified in the assignment of errors; and, as they in no degree affect the conclusion reached on the law of the case, no practical end can be subserved by further discussion. It may be properly added, however, that the contention of the defendants in error that the right to have the sentence of the Circuit Court reviewed by this court should be conditioned upon a motion for new trial in the court below and the overruling of the same (citing *Zimmerman v. State*, 46 Neb. 15, 64 N. W. 375), is not tenable. A motion for new trial is not essential in this jurisdiction to entitle a party to a review by the Court of Appeals. This has been so repeatedly decided as not to require the citation of authorities. The writ of error in this case was the proper remedy. *Bessette v. W. B. Conkey Company*, 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997.

It results that the judgment of the Circuit Court must be affirmed.

(155 Fed. 838.)

In re LOVELAND. In re LITTLEFIELD. PUTNAM v. LOVELAND.

(Circuit Court of Appeals, First Circuit. February 13, 1907.)

Nos. 675, 676.

1. BANKRUPTCY—JURISDICTION OF COURT—SALE OF PROPERTY.

A court of bankruptcy has jurisdiction to order a sale of property of a bankrupt upon which a lien is asserted free from such lien, and without first determining either its validity or amount.

2. SAME—VALIDITY OF TRANSFER—EFFECT OF STATE STATUTE.

Although the rights of a trustee in bankruptcy and those of an assignee in insolvency under a state statute are defined in similar language, yet a state statute making a certain transfer void as against an assignee *eo nomine* does not make it void as against a trustee in bankruptcy.

3. SAME—VALIDITY OF MORTGAGE—INCREASE OF DEBT BY AGREEMENT.

A mortgagor, after having paid a part of a mortgage debt, borrowed further sums from the mortgagee, and indorsements were made upon the mortgage note, to the effect that such sums should be added to the amount previously remaining due thereon. *Held*, that the mortgage was a valid lien in equity for the full amount of the debt as so increased as against the mortgagor's trustee in bankruptcy, whether tested by the statutes of Massachusetts as construed by its Supreme Judicial Court or by the provisions of the bankruptcy act.

Appeal from the District Court of the United States for the District of Massachusetts.

Charles F. Hall and Arthur W. Blakemore, for petitioner.
George Chandler Coit, for trustee.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

LOWELL, Circuit Judge. On July 14th Littlefield, the bankrupt, mortgaged real estate to Hall for \$6,000, payable in five years. Note and mortgage were in the usual form. Payment of interest to July 14, 1905, was duly made and indorsed on the note, as were sundry payments of principal, the last in 1899 amounting in all to \$4,800. Hall died before October 1, 1901, and on that day Littlefield borrowed from Hall's estate \$3,500. The following indorsement was then made on the note:

"Boston, October 1, 1901.

"I have this day borrowed of the estate of Joseph E. Hall the sum of \$3500, making the amount of the principal of this note the sum of \$4700.

"Warren H. Littlefield."

On July 26, 1902, Littlefield borrowed \$1,300 more, and a corresponding indorsement was made. Littlefield was adjudged bankrupt October 16, 1905, on a creditor's petition filed September 27th.

Thereafter the trustee in bankruptcy filed a petition with the referee, praying for leave to sell the real estate free from the incumbrance of the mortgage. The referee ordered a sale for not less than \$7,500, which sum was to be deposited in a separate account to meet the claims of the mortgagee, Hall's administratrix. This order was affirmed by the district judge and the mortgagee has filed in this court an original petition to revise the order of the District Court in matter of law. This is the question presented in No. 675.

Beside these proceedings, and without prejudice thereto, the mortgagee filed a petition with the referee, asking that her lien be satisfied from the proceeds of the sale. The referee ruled that the lien of the mortgage was valid only to the extent of \$1,200 and interest, but the learned district judge held it valid for \$6,000 and interest, and from his decree the trustee took an appeal to this court. This is the question presented in No. 676.

The petition for revision is easily disposed of. The court of bankruptcy has jurisdiction to order a sale of the estate of the bankrupt upon which a lien is asserted, without first determining either the validity or amount of the lien. In re Union Trust Co., 122 Fed. 937, 59 C. C. A. 461; Mason v. Wolkowich (decided by this court October 9, 1906) 150 Fed. 699, 80 C. C. A. 435, 10 L. R. A. (N. S.) 765; Marion E. Tucker, Petitioner (decided October 31, 1906) 153 Fed. 91, 82 C. C. A. 225. The petition for revision, therefore, must be dismissed with costs for the respondent.

We pass to the question presented by the appeal. It will be convenient to set out certain statutes of Massachusetts and certain sections of the bankrupt act which have been supposed to be material.

Rev. Laws, Mass. c. 127, § 4:

"A conveyance of an estate in fee simple, fee tail or for life, or a lease for more than seven years from the making thereof, shall not be valid as against any person, except the grantor or lessor, his heirs and devisees and persons having actual notice of it, unless it, or an office copy as provided in section

fifteen of chapter twenty-two, is recorded in the registry of deeds for the county or district in which the land to which it relates is situated."

Mass. Rev. Laws, c. 163, § 37:

"A mortgage of land recorded more than four months after its date shall not be valid against an assignee of the estate of the mortgagor if proceedings in insolvency are commenced within one year from the recording of such mortgage."

Bankr. Act July 1, 1898, c. 541, § 67a, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]:

"Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

Bankr. Act, § 70a (5):

"The trustee of the estate of a bankrupt * * * shall * * * be vested by operation of law with the discharge of the bankrupt * * * to all (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

Where the trustee in bankruptcy and a transferee of the bankrupt both claim certain property which once belonged to the bankrupt, it may be difficult to decide how far the title to the property in question depends upon the state law which determines the effect of the bankrupt's conveyance, and how far upon the bankrupt act which declares what property the trustee shall take. The one law regulates the passage of title from the bankrupt, and is interpreted by the state court. The other law regulates its passage to the trustee, and is interpreted by the federal court. Concerning the questions raised in the case at bar both courts have reached the same conclusion.

That the payment made on the mortgage operated pro tanto to discharge it at law is not disputed. No oral agreement, and, indeed, nothing but a deed duly executed, could thereafter make the mortgage valid in a court of law as security for a sum larger than the balance left due upon it. But in *Upton v. National Bank of South Reading*, 120 Mass. 153, where the mortgagor and mortgagee had attempted by oral agreement to increase the amount for which a mortgage of real estate stood as security after it had been partly paid, the Supreme Court of Massachusetts, sitting in equity, refused to allow an assignee in bankruptcy under the act of 1867 to redeem the property, except upon payment of the money secured by the oral agreement. If the rights of the trustee in bankruptcy here depend upon the statutes of Massachusetts governing the title to real estate, there is no material difference between the *Upton* case and the case at bar. It is true that the trustee's proceeding here is not in the form of a bill to redeem, but a court of bankruptcy is a court of equity, and the form of proceeding is unimportant. It is true, also, that the registry statute of Massachusetts was not cited in the *Upton* case, but it was then in existence, and, if the state court deemed it material, doubtless it would have been noticed. We mention St. 1888, p. 402, c. 393, passed after the decision in the *Upton* case and embodied in Rev. Laws Mass. c. 163, § 37, only to show that we have not overlooked it. Although the rights of a trustee

in bankruptcy and those of an assignee in insolvency under the statutes of Massachusetts are defined in similar language, yet a statute making a certain transfer void as against the latter *eo nomine* does not make it void as against the former.

The bankrupt act of 1898, it is true, defines the rights in property which pass to the trustee in language different from that used in the act of 1867 to define the rights which passed thereunder to an assignee in bankruptcy. In this respect, as has been said, there is much similarity between the bankrupt act of 1898 and the insolvent law of Massachusetts. Section 70a (5) of the bankrupt act vests in the trustee property which the bankrupt "could by any means have transferred or which might have been levied upon or sold under judicial process." Pub. St. c. 157, § 46, vested in the assignee in insolvency the property of the debtor "which he could have lawfully sold, assigned or conveyed, or which might have been taken on execution upon a judgment against him." See Rev. Laws, c. 163, § 54. In *Smythe v. Sprague*, 149 Mass. 310, 21 N. E. 383, 3 L. R. A. 822, the Supreme Court of Massachusetts held that land conveyed by a deed unrecorded until after the assignment in insolvency did not pass to the assignee. It follows that the state statutes before us, as construed by the courts of Massachusetts, allow an unrecorded deed to pass to the grantee thereunder a title valid as against a trustee in bankruptcy appointed under the existing federal law. The Supreme Court of Massachusetts has in effect construed the statutes before us in favor of the appellee in this case.

The Supreme Court of the United States has reached the same conclusion in its interpretation of the present bankrupt act. The general principles of equity, as recognized in the federal courts, give effect to the intention of parties who intend to create a lien under the circumstances of this case, notwithstanding that their agreement by reason of its informality is invalid at law. In *York Mfg. Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, the Supreme Court had to deal with an unrecorded conveyance in a state whose statutes required a record, and the title of the transferee was held to be superior to that of the trustee in bankruptcy. The statute there in question, as construed by the state court, made an unrecorded mortgage void as against certain classes of creditors, while leaving it valid as against other classes. The state statute before us makes the unrecorded conveyance void as against creditors without notice, leaving it valid as against those creditors who have notice of it.

To whatever extent the title of the trustee in bankruptcy to the property here in question depends, either upon the statute of Massachusetts as interpreted by the state courts, or upon the bankrupt act as interpreted by the Supreme Court, or upon both, we find that all the statutes in question have been construed by the courts which have ultimate authority to fix their meaning as giving to the mortgagee in the case at bar a lien superior to the rights of the trustee in bankruptcy.

In No. 675, *Loveland*, Petitioner, let there be a decree that the petition be dismissed, with costs for the respondent.

In No. 676, *Putnam v. Loveland*, the decree of the District Court is affirmed, and the appellee recovers costs in this court.

(155 Fed. 842.)

**UNITED SHOE MACHINERY CO. v. DUPLESSIS SHOE
MACHINERY CO.**

(Circuit Court of Appeals, First Circuit. August 2, 1907.)

No. 689.

1. PATENTS—TERM—EXPIRATION OF FOREIGN PATENT.

The claim that a British patent covering an invention also patented in the United States was taken out by an intermeddler, and was unauthorized, and therefore that its expiration did not affect the term of the American patent, cannot be sustained, where the American patentees authorized the taking out of a patent in England, and under the other circumstances named in the opinion, did not repudiate the one in fact obtained until after its expiration.

2. TREATIES—CONSTRUCTION AND EFFECT—RELATION TO STATUTES.

Treaties and statutes of the United States have always been practically put in the same class, so far as judicial action is concerned, to the extent that a later treaty has the same effect on a prior statute that a later statute has, and may supersede it as a later statute may supersede a prior treaty. Nor is there any practical distinction as between a statute and a treaty with regard to its becoming presently effective without awaiting further legislation which depends entirely upon its terms.

3. STATUTES—CONSTRUCTION—RESORT TO TITLE.

When a legislative act is general in its terms, the title may be resorted to for the purpose of ascertaining its proper limitations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 288.]

4. PATENTS—TERM—EFFECT OF TREATY.

Article 4 bis, inserted in the international convention for the protection of industrial property of March 20, 1883, by the additional convention or act of December 14, 1900, proclaimed by the President August 25, 1902 (32 Stat. 1936, 1939), as controlled and construed by Act March 3, 1903, c. 1019, 32 Stat. 1225 [U. S. Comp. St. Supp. 1905, p. 663], "to effectuate the provisions" of such additional act of convention, did not have the effect of changing the term of an existing United States patent as fixed by statute at the time of its issuance; and such a patent granted prior to January 1, 1898, and which is limited by the provisions of Rev. St. § 4887 [U. S. Comp. St. 1901, p. 3382], to the term of a prior foreign patent, is not extended by such additional act.

5. SAME—SOLE SEWING MACHINE.

The French and Meyer patent, No. 412,704, for a sole sewing machine, expired September 17, 1902, with the expiration of the term of the prior British patent, No. 13,366, of 1888, granted to the same patentees for substantially the same invention.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

For opinion below, see 148 Fed. 31.

Elmer P. Howe and Benjamin Phillips, for appellant.

T. Hart Anderson, for appellee.

Before COLT and PUTNAM, Circuit Judges, and BROWN, District Judge.

PUTNAM, Circuit Judge. This is a bill in equity based on an alleged infringement of letters patent No. 412,704, covering an invention for an alleged improvement in sewing machines, and issued to Zachary T. French and William C. Meyer on October 8, 1889, on an applica-

tion filed on July 30, 1888. The bill was filed on December 21, 1903, and it alleged infringements on and after October 1, 1903. The decree below was for the respondent.

The only question we need consider is whether, under section 4887 of the Revised Statutes, with its various amendments, the patent in suit was terminated on September 17, 1902, by reason of the termination of a certain British patent on that day. The legal questions involved relating to the identity of the patenting were fully discussed by us in *Westinghouse Electric Co. v. Stanley Instrument Co.*, 138 Fed. 823, 71 C. C. A. 189, in an opinion passed down on June 14, 1905, and in *Thomson-Houston Electric Co. v. McLean*, in an opinion passed down on April 11, 1907, 153 Fed. 883.¹ The learned judge of the Circuit Court correctly applied the principles stated in those opinions to the facts of this case. We have no occasion to reconsider anything said by him on that issue. This especially applies to his observation, not limited to any particular claim in either patent, but relating to the whole of each patent, to the effect as follows:

"I can find in neither patent here in question evidence of 'an essential, novel, and patentable improvement on what was claimed' in the other."

The complainant maintains that the British patent was taken out by an intermeddler. The position on this point is as follows: It is not questioned that Mr. Gregory, a patent solicitor, was authorized to represent the inventor in England, and that he sent instructions to Brooks, his correspondent there, the purpose of which was to secure simultaneous patenting. At some time, not named, a letter was discovered from one Munyon and one Goodyear to Brooks of September 14, 1888, directing Brooks to disregard Gregory's instructions, and to file the application in each country as soon as possible. There is a failure to directly prove any authority of Munyon and Goodyear to thus override Gregory. Nevertheless the Circuit Court, and we on appeal, proceeding on a bill in equity of this character as finders of the facts, have as wide a range for drawing inferences as a jury. There is no evidence that the inventor, or whoever controlled the invention, ever repudiated the British patent until after this suit was commenced, or attempted to do so. As he, whoever he was, knew that there was to be an application for a British patent, and that there was a purpose to take it out, it is beyond reasonable probability to assume that he never informed himself as to the issue of such a patent. On the other hand, the Circuit Court, and we, are entitled to assume that he obtained knowledge of what was done and acquiesced therein. Any hypothesis which would reject the conclusion of the Circuit Court in this respect, to the effect that the British patent was properly taken out, would be unreasonable.

The only other topic which we need consider is covered by the proposition of the complainant based on a series of conventions, or treaties, for the "international protection of industrial property," by which is meant especially trade-marks and patents. The first was signed at Paris on March 20, 1883, between various nations, to which ratification by the United States was completed on March 29, 1887. Articles 3, 4, and 5 of this treaty relate to patents for inventions. A subsequent

¹ 82 C. C. A. 629.

treaty, which is of no consequence in this connection, as it related only to some details, was signed at Madrid on April 15, 1891. The treaty in which we are particularly interested was signed at Brussels on December 14, 1900, and was proclaimed by the President of the United States on August 25, 1902, 32 Stat. 1936. By the agreement among the ratifying governments, this treaty which is ordinarily called "An additional act," went into effect on September 14, 1902, three days before the British patent in question here terminated. 32 Stat. 1943. Article 1, p. 1939, reads as follows:

"The International Convention of March 20, 1883, is modified as follows:

"I. Article 3 of the convention shall read as follows:

"Art. 3. Are assimilated to the subjects or citizens of the contracting states, the subjects or citizens of states not forming part of the Union, who are domiciled or have bona fide industrial or commercial establishments upon the territory of one of the states of the Union.

"II. Article 4 shall read as follows:

"Art. 4. Any one who shall have regularly deposited an application for a patent of invention, of an industrial model, or design, of a trade or commercial mark, in one of the contracting states shall enjoy for the purpose of making the deposit in the other states, and under reserve of the rights of third parties, a right of priority during the periods hereinafter mentioned.

"In consequence, the deposit subsequently made in one of the other states of the Union before the expiration of these periods cannot be invalidated by acts performed in the interval, especially by another deposit, by the publication of the invention or its working, by the sale of copies of the design or model, by the employment of the mark.

"The periods of priority above mentioned shall be twelve months for patents of invention, and four months for design or industrial models, as well as for trade or commercial marks.

"III. There is inserted in the convention an article 4 bis, as follows:

"Art. 4 bis. Patents applied for in the different contracting states by persons admitted to the benefit of the convention under the terms of articles 2 and 3 shall be independent of the patents obtained for the same invention in the other states adherents or nonadherents to the Union.

"This provision shall apply to patents existing at the time of its going into effect.

"The same rule applies, in the case of adhesion of new states, to patents already existing on both sides at the time of the adhesion."

The complainant maintains that the first paragraph of article 4 bis relates specifically to the topic we have under consideration, and that the declaration of independency is intended to prohibit any result by virtue of which a patent granted by one nation for a specified statutory term should be abbreviated as to its term by reason of the expiration of any patent granted by another nation. The paragraph relied on is obscure, because there are so many different aspects in which a patent, or anything, may be independent of or dependent on something else.

There were several international conferences between 1883 and 1900 on the topic of patents and trade-marks to which we need not refer, except the one at Brussels at which a convention was signed on December 14, 1897, never in force in the United States.

One question is the weight to be given to the article 4 bis under the Constitution of the United States. The Constitution speaks of treaties and statutes in the same breath; and they have always been practically put in the same class by the Supreme Court. More than 100 years

ago, in *United States v. The Schooner Peggy*, 1 Cranch, 103, 110 (2 L. Ed. 49) the court said:

"But yet where a treaty is the law of the land, and as such affects the right of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court as an act of Congress."

There never has been any doubt on this proposition. Consequently it was said absolutely in *The Cherokee Tobacco*, 11 Wall. 616, 621 (20 L. Ed. 227):

"The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty."

This has been repeated many times, the last in *Hijo v. United States*, 194 U. S. 315, 324, 24 Sup. Ct. 727, 48 L. Ed. 994. Consequently, so far as judicial action is concerned, a later treaty has the same effect on a prior statute as a later statute has; and, so far as the conventions pertinent here are concerned, the fact that the Constitution commits to Congress the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries," is of no consequence, because all the powers of Congress are especially vested, either directly or indirectly, by the Constitution in similar manner; and to hold that a treaty could not abrogate a prior statute regarding patents because this particular legislative power is committed to Congress could not be permitted so long as the general rule as to statutes superseding treaties, and, vice versa, declared by the Supreme Court in the way we have pointed out exists. The rules which we have explained with reference to the relation of treaties to statutes, and as to treaties becoming immediately effective, are the necessary sequence of the decisions explained in *United States v. Lee Yen Tai*, 185 U. S. 213, 220, 221, 222, 22 Sup. Ct. 629, 46 L. Ed. 878.

But the respondent, now the appellee, maintains that article 4 bis of the convention of 1900 was not effectual until enacted into a statute by Congress. An examination of the decisions of the Supreme Court on this topic will show there is no practical distinction whatever as between a statute and a treaty with regard to its becoming presently effective, without awaiting further legislation. A statute may be so framed as to make it apparent that it does not become practically effective until something further is done, either by Congress itself or by some officer or commission intrusted with certain powers with reference thereto. The same may be said with regard to a treaty. Both statutes and treaties become presently effective when their purposes are expressed as presently effective; and, on its face, article 4 bis of the convention in question is so expressed. A striking illustration of the rule that treaties become effective in the same manner as statutes is found in *United States v. The Schooner Peggy*, 1 Cranch, 103, 2 L. Ed. 49, already cited. This vessel was condemned in the Circuit Court on September 23, 1800. A treaty with France became effective on September 30, 1800; and, inasmuch as the judgment of the Circuit Court

was subject to a writ of error which was sued out on October 2, 1800, the Supreme Court held that the treaty annulled the condemnation.

Nevertheless, Congress has legislated on the topic since the treaty was ratified; and, under the rule which we have stated, that subsequent legislation, so far as it expresses any Congressional purpose inconsistent with any claimed construction of article 4 bis, or inconsistent with its becoming effective of its own force, that purpose controls, and the purpose of Congress in the act to which we will refer is so marked out by implication, although not stated in express terms, that what construction should be put on article 4 bis, and what rule should be applied as to its becoming effective, have become purely academical questions so far as this appeal is concerned. The act to which we refer is that of March 3, 1903 (32 Stat. 1225, c. 1019 [U. S. Comp. St. Supp. 1905, p. 663]), which preceded in time the filing of this bill and the infringements alleged therein.

It becomes necessary in this connection to turn back to Senate Document 331, Fifty-Fifth Congress, Second Session, being a report from the Committee on Foreign Relations, with accompanying papers. This concerns the convention signed at Brussels on December 14, 1897, which we have spoken of, never accepted by the United States. We refer to the report of the United States commissioners who took part in the conference at Brussels, dated December 15, 1897. That stated as follows:

"A new article, entitled article 4 bis, provides for the mutual independence of patents applied for in the different states of the Union by persons entitled to the rights granted by the convention."

It added that the delegates from the United States supported this proposed new article under instructions; but it then proceeded as follows:

"In order to avoid any confusion in regard to the interpretation hereafter to be given to the second paragraph, which reads, 'This provision shall apply to all patents existing at the time of its entering into force,' we called attention to it in the regular meeting and found that it was the unanimous sense of the conference that the paragraph was not applicable to existing United States patents, but only to those patents whose terms might be shortened by the laws of those states of the Union in which provision is made for a shortening of the term on the lapsing of patents for the same inventions in other states.

"An existing United States patent cannot be affected by what may take place in regard to a patent for the same invention abroad. The limitation of the terms of the United States patents imposed by section 4887 was a determination at the moment of the grant of the patent of its term, and therefore the duration of the patent is unaffected by the subsequent expiration of a foreign patent for the same invention by reason of non-payment of taxes or non-working."

The article in the proposed convention to which these observations related read as follows:

"Art. 4 bis. Patents applied for in the different contracting states by persons admitted to the benefit of the convention under the terms of articles 2 and 3, shall be independent of the patents obtained for the same invention in the other states adhering or not to the Union.

"This provision shall apply to patents existing at the time of its going into effect.

"The same rule applied in the case of adhesion of new states as to patents already existing either in the Union or in the new adhering state at the time of the adhesion."

This language was literally the same as that now under discussion, found in the convention of December 14, 1900, with the following exceptions: The first sentence now closes with the words, "adherents or non-adherents to the Union," instead of the words, "adhering or not to the Union"; and also the last sentence now ends with the words, "to patents already existing on both sides at the time of the adhesion," instead of the words, "to patents already existing either in the Union or in the new adhering state at the time of the adhesion." It is not possible that these merely literal changes can in any way affect any question which we have before us. It is especially to be noted that the commissioners reported that all the commissioners present were unanimous that this proposed phraseology of the convention of 1897 would not affect the expiration of United States patents already issued. We have received, through the courtesy of the state department, a copy of the report of the commissioners who negotiated the treaty of December 14, 1900, but it makes no reference to the topic we are discussing.

Thus the convention of 1900 and the proposed convention of 1897 alike contained the provisions in reference to patents existing at the time the treaty went into effect, and relative to new adhering states, on which the complainant relies as saving its patent.

The act of 1903, to which we have referred, is entitled:

"An act to effectuate the provisions of the additional act of the international convention for the protection of industrial property."

What is there called "the additional act" is the convention of December 14, 1900. There is no express provision in the statute itself in line with the title; and it is rare that the title is effectual. We all know that Lord Coke said that it ought not be taken into consideration at all; but there are occasions when the language of an act is couched in such general terms that we must go to the title to find its limitations. The Supreme Court has reiterated Lord Coke's observation, but with the qualification which we state, to the effect that, when the mind labors to discover the design of the Legislature, it seizes everything from which aid can be derived, and then the title will have its due share of consideration. *The Bark Eudora*, 190 U. S. 169, 172, 173, 23 Sup. Ct. 821, 47 L. Ed. 1002. A very striking illustration of this with reference to the later statutes about aliens appears in the opinion of Judge Gray, in behalf of the Circuit Court of Appeals for the Third Circuit, in *Rodgers v. United States*, 81 C. C. A. 454, 152 Fed. 346, 350. The statutes there in issue use the broad word aliens, and yet the title was availed of by the court to limit them to aliens who were immigrants. We cannot doubt that the act of 1903 to which we refer is to be construed as passed for the purpose named in its title; and, inasmuch as it relates to the same topics involved here as the convention of December 14, 1900, we can also have no doubt that it is to be regarded as covering the entire ground so far as it concerns us. This is the well-settled rule of construction applied under such circumstances to legis-

lation which has the form of codification. The ruling of the Supreme Court in *Dallemagne v. Moisan*, 197 U. S. 169, 175, 25 Sup. Ct. 422, 49 L. Ed. 709, in regard to various treaties respecting consular jurisdiction over crews of vessels of foreign nations, and referring to a statute of the United States enacted in relation thereto, observed as follows:

"This statute, having been passed by the United States for the purpose of executing the treaties it had entered into with foreign governments, must be regarded as the only means proper to be adopted for that purpose."

That observation directly applies here, and fully supports the rule of construction which we have stated with regard to legislation which has the form of codification. Fairly paraphrasing the language of the Supreme Court cited, we may say that the statute of 1903, having been passed for the purpose of executing treaties, must be regarded as expressing the only effect which Congress intended they should have to the extent of the subject-matters to which the act relates. It reenacts section 4887 in such form as Congress desired, faithfully omitting such parts of the convention of 1900 as referred to patents existing at the time it went into effect, or as referred to newly adhering states. It is to be borne in mind that treaties with foreign nations have a liberal construction, even at variance with the apparent meaning of the mere letter when interpreted according to the rules of the common law. The purpose is to work out the common intention, including that of peoples who know nothing about the common law, and who use phraseology different from that to which we are accustomed. A noticeable declaration of this fact is found in *United States v. Winans*, 198 U. S. 371, 380, 25 Sup. Ct. 662, 49 L. Ed. 1089, where the Supreme Court reiterated that it would sometimes go to the extent of construing a treaty with Indians as they understood it when it was made, rather than according to its letter. Certainly it would not violate any just rules, if either the executive, the judiciary, or the Congress of the United States should construe a treaty in accordance with what was clearly the common understanding of all the commissioners who negotiated it. The courts might safely do this; and, perhaps, they would be compelled to when there was a formal protocol of the proceedings of the negotiations expressing it. Under the circumstances here, Congress might well be justified in acting on the report of the commissioners who were concerned in the intended convention of 1897, to the effect that all present were of the opinion that the proposed article then under consideration could not affect existing patents in the United States, in view of the fact that the same language was carried forward into the treaty of 1900, without any contravening statement from any of the parties who negotiated it. This may well explain why it is that we find the act of 1903 in the form in which we do find it. At any rate, that act did omit the special provisions with reference to existing patents, and future adhering states, on which the complainant relies; and, for the reasons which we have stated, we must conclude that this was purposely done.

Whatever might have been the condition with reference to a bill in equity filed before the act of 1903, covering infringement prior

thereto, we have here a statute passed before filing of the existing bill, and the infringements now alleged, which pronounces the construction we must give the convention of 1900, according to the legislative will declared since it was ratified. In any event, the courts would hesitate before giving a treaty an interpretation differing from that solemnly given it by the executive or by Congress, even if they would ever do it. According to the law as it stood when the patent in suit issued, it expired with the British patent. To enable it to run its statutory term, retroactive legislation by statute or treaty was necessary. It is not impossible that the convention of 1900 might have been regarded as retroactive and as reaching this patent; but, before any issue arose between the parties to this appeal, and therefore before any rights against the respondent could have vested in the complainant, Congress interposed and pronounced the legislative will, subsequently to the ratification of the convention, that it should not be regarded as retroactive. Consequently we find no saving clause so far as the litigation here is concerned.

In *Sawyer Spindle Company v. Carpenter*, 143 Fed. 976, 75 C. C. A. 162, in which we passed down an opinion on February 23, 1906, that portion of the act of 1903 which re-enacted section 4887 of the Revised Statutes [U. S. Comp. St. 1901, p. 3382] was held not to be retroactive so far as concerns patents which had then expired, and the general rule that statutes are not to be held retroactive was stated. While it is true that in *Sawyer Spindle Company v. Carpenter* the patentee did not rely on any international convention, and brought none to our attention, yet it is also true that the result reached in that case was in harmony with the ordinary rules of statutory construction. We are of the opinion that here the Circuit Court was correct, and that there is nothing in the treaties made by the United States, as controlled and construed by the later federal statute, which saves the complainant.

The decree of the Circuit Court is affirmed; and the appellee recovers its costs of appeal.

(155 Fed. 405.)

THE BALTIMORE.

(Circuit Court of Appeals, Fourth Circuit. May 25, 1907.)

No. 686.

COLLISION—STEAMER AND SCHOONER—FAILURE TO SHOW PROPER LIGHTS.

A schooner *held* in fault for a collision with a steamer in Chesapeake Bay in the night, on the ground that, while becalmed, she had been drifted around by the tide so that the steamer was an overtaking vessel, and could not see her side lights, and she failed to exhibit any white light or flare-up astern as required by the rules, although the steamer was seen approaching for a considerable time before the collision.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, §§ 105–116.

Overtaking vessels, see note to *The Rebecca*, 60 C. C. A. 254.]

Appeal from the District Court of the United States for the District of Maryland.

The following is the opinion of the District Court by Morris, District Judge, delivered orally:

This collision occurred in the Chesapeake Bay about 11 o'clock at night. December 19, 1905, some four miles to the north of Point-No-Point. The night was dark, but the atmosphere was clear, except for a slight haziness on the surface of the water. The schooner was a small and very old vessel of about 55 tons, loaded with lumber. The deck load extended three or four feet outside her hull and up to the foremast, and was about four feet in height above the deck. She was on her way up the bay, having come out of the Rappahannock river the day before. The steamer *Baltimore*, a large passenger steamer of the Chesapeake Steamship Company, had left Baltimore at 5 p. m. on her regular trip to West Point on the York river. She was proceeding south by E. $\frac{1}{4}$ E. down the bay in the usual track of steamers of her class. The case stated for the schooner in her libel is that the schooner was on her port tack with the wind very light from N. N. W. with hardly sufficient headway for steerage, making a course N. N. E., that the lookout reported the steamer's headlight an hour before the collision, and that the schooner held her course and watched the lights of the steamer until in a short time, without change of course, the steamer ran into the schooner, striking her on her port side forward of the fore rigging, cutting off the fore part of the schooner and carrying away her foremast, fore rigging, foresail and fore topmast, and so injuring her that she filled at once, carrying down one of her crew who was in the forecabin, and who was drowned.

The case for the steamer, as stated in her answer and cross-libel, is that she was proceeding at her usual speed of 12 miles an hour with her second officer on duty in the pilot house, a quartermaster at the wheel, and a lookout forward near the stem; that the first they saw was the bow light of the steamer reflected on the sails of the schooner directly in front of the steamer, less than 100 feet distant, and heading southeast in such a direction that her side lights could not be seen from the steamer and that no white light or flare-up was exhibited to the steamer over her stern; that the reflection was reported by the lookout and seen by the second officer at the same moment; that the second officer at once rang for full speed astern, but before the steamer's headway was checked her stem struck the schooner on the port side, forward of the foremast, and cut away the schooner's bow, without disturbing the deck load. The fault charged against the schooner is not having displayed a white light or flare-up on the schooner's stern, in compliance with article 10 of the act of Congress of June 7, 1897 (30 Stat. 96, c. 4 [U. S. Comp. St. 1901, p. 2879]), she being the overtaken vessel. The course of the steamer I take to be established as south by E. $\frac{1}{4}$ E.; that was the proper and usual course for her, and there is no reason to doubt the steamer's witnesses that it was the course

of the steamer that night. The schooner's witnesses gave her heading as N. N. E., and the pinch of the case is the correctness of the schooner's contention as to her heading.

In the first place, it may be well to consider the relative possibility of want of vigilance on the part of those on watch on the respective vessels. The crew of the schooner consisted of the master (who was also the owner) and three colored men. The master for some time before the collision was below in the cabin and the colored mate had the wheel. There was a young colored man as lookout standing on the deck load at the port forerigging. The lookout was also cook during the day, and the mate had been on duty nearly all Monday and Monday night, and had but short intervals of rest on Tuesday. The steamer had left Baltimore only five hours before; the lookout had been on watch only one hour and the second officer since 6 o'clock. The mate and lookout on the schooner testify that they saw the steamer's light a very long distance off, and that she continued to approach directly toward the schooner, but the mate did not call the master, who was just below him in the cabin, and the lookout did not call up the man who was asleep in the forecabin just under him. That the mate did not call the master is certainly significant and leads to the inference that, after the two men on the schooner first saw the steamer, they were too drowsy to watch her, and too stupid with weariness to do anything.

The important question is the heading of the schooner. In the schooner's libel and in the testimony of the two men on her deck and of her master it is said that the wind was N. N. W. and the schooner's heading N. N. E., but it is also stated that the wind was so light that the schooner did not have steerageway. If the wind had been as they state, N. N. W., and sufficient for steerageway, the schooner could not have made a course N. N. E. It would be impossible for a schooner of this class with a heavy deck load piled four feet, in a very light wind hardly sufficient for steerage, to keep a course four points off the wind. That may have been her heading when those on the schooner first saw the steamer's light, but there was no reason why she should keep that heading. The fact was that the schooner was becalmed and was keeping no course at all, but was drifting. The tide since 8 o'clock had been flooding and setting her up the bay, and that current acting with most force on her stern, which was deepest in the water, would carry her stern to the northward and set her bow more and more to the eastward and southward. As to the wind, if there was at that time any wind, I am satisfied that the preponderance of proof is that it was not from the N. N. W., but to the east of north, what there was of it. I am satisfied that, whatever may possibly have been the heading of the schooner when those on her deck say they first saw the steamer to the northwest off their port bow, that before the steamer had approached near enough to see the schooner's port light, the schooner's head, under the influence of the tide, had come around until she pointed at least southeast. In that relative situation, the schooner's port light could not be seen from the steamer. The schooner was then the overtaken vessel, and was under obligation to exhibit a bright light or flare-up from her stern.

The second officer and lookout of the steamer appear to have been vigilant, and there does not appear to me to be any way of accounting for their not seeing the schooner's port light, except that the schooner had drifted around so as to bring her port light abaft her beam to the steamer. It is urged in behalf of the schooner that the character of the wound is not consistent with a blow from the stern. The effect of a blow given by one vessel to another in collision cases is often surprising, and is not an altogether safe premise to argue from. Both vessels are moving and both yield to the impact. In this case the blow was just forward of the deck load. The bow of the schooner was cut off and the deck load but slightly moved. If the blow had come from forward, more in the direction toward the schooner's stern, it seems probable, as the steamer was going full speed, that the steamer would have brought up against the deck load and carried the schooner with her and have forced her open, rather than have sliced off the bow and headgear as she did. I see nothing sustaining the theory urged in behalf of the schooner which is deducible from the wound to the schooner produced by the blow.

It is urged that because at the moment of the collision the second officer of

the steamer says he did discern the red light the steamer must have been approaching the schooner from forward of the schooner's beam. I do not think it necessarily so follows. The steamer was running forward on the schooner, and may have opened the light to the second officer by running past the screen. The bow of the steamer may have already struck the forward rigging and disturbed the screen, or the second officer, being high up above the schooner's deck, may have looked down on the light from above. I must further say that there is some doubt cast upon the schooner's case by the discrepancies between the testimony of the master and owner at the investigation before the steamboat inspectors and his statements in court.

Upon the whole case, I find that the schooner was in fault, in that she was heading in such a direction that the steamer was coming up more than two points abaft her beam and unable to see her side lights, and that the schooner did not make known her presence by exhibiting a white light or flare-up light from her stern.

I find the schooner solely in fault.

J. Kemp Bartlett and Robert H. Smith, for appellants.

Arthur D. Foster and Reuben C. Foster, for appellee.

Before PRITCHARD, Circuit Judge, and BRAWLEY and BOYD, District Judges.

PER CURIAM. The decree of the court below dismissing the libel of George H. White, master and owner of the schooner Amelia M. Price, is affirmed.

In so far as said decree awards damages to the steamship Baltimore for the injuries sustained by said steamship in the collision, and orders execution against George H. White, the owner of the schooner, said decree is reversed, the costs in this court to be divided.

(155 Fed. 407.)

PHILADELPHIA & R. R. CO. v. BAKER.

(Circuit Court of Appeals, Third Circuit. May 13, 1907.)

No. 27.

1. RAILROADS—ACTION FOR INJURY IN COLLISION—PENNSYLVANIA STATUTE.

Act Pa. April 4, 1868 (P. L. 58), which provides that, when any person shall sustain personal injury or loss of life while lawfully engaged or employed "on or about the road, work, depots and premises of a railroad company" of which company such person is not an employé or passenger, the right of action and recovery shall be the same as would exist if such person were an employé, does not prevent a recovery from a railroad company for the death of an engineer in the employ of another company, who, while running a train of such company over a track of defendant, under an agreement which gave it the right of way, was killed in a collision with a train of defendant negligently being run upon the same track, since the track was not at the time the premises of defendant, whose train was there without right, but of the lessee.

2. SAME—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

The charge of the court, in an action to recover for the death of a railroad engineer, killed in a collision between his train and a train of defendant company, *held* to have fairly submitted to the jury the question of contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 951.]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 149 Fed. 882.

Gavin W. Hart, for plaintiff in error.

Charles H. Edmunds, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, Sarah Jane Baker, a citizen of New Jersey, brought suit against the Philadelphia & Reading Railroad Company, a citizen of Pennsylvania, to recover damages for the death of her son, Henry K. Baker, which she alleged resulted from the negligence of that company. There was a verdict and judgment in her favor. Thereupon defendant sued out this writ of error.

Henry K. Baker was a locomotive engineer, employed by the Central Railroad Company of New Jersey. At the time of his death his engine was hauling a train of freight cars for that company from Jersey City to Philadelphia. The latter portion of the run was made under a trackage arrangement between the two companies over the tracks of the defendant. After Baker's train approached Tabor Junction, he was signaled by the defendant company's tower man to take the south-bound track of the defendant company. While running thereon, at a point south of the signal tower, Baker's engine struck the engine of a local freight train of the defendant company which was passing from the south to the north bound track. This Reading train had not only no right on the south-bound track at the time, but it violated the rules of that road in having no flagman out to warn approaching trains.

It is thus clear that Baker's death was caused by the negligence of the Reading Road's employes, and that company was justly held responsible for damages unless, by virtue of the Pennsylvania statute of April 4, 1868 (P. L. 58), Henry K. Baker is held to be an employe of the Reading Road, and the negligence of its employes treated as that of his co-employes. This statute provides:

"That when any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the road, works, depots and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employe, the right of action and recovery in all such cases against the company shall be such a one as would exist if such person were an employe; provided that this section shall not apply to passengers."

It was lately before us in *Delaware & Hudson Company v. Yarrington*, 152 Fed. 396, 81 C. C. A. 522. We there said:

"Seeing then that the defendant company had at the time and place of this accident no right whatever to occupy this tract, and that it was guilty of negligence in obstructing the passage of the train on which plaintiff rode, we hold the act had no application."

That case controls the present, for here, as there, the track where the accident occurred, while the property of the Reading Company, was, when the accident occurred, the property for the time being of the Central Railroad of New Jersey. The court below therefore rightly held the act of 1868 did not apply.

Objection is made that the court excluded from the jury considera-

tion of Baker's alleged contributory negligence in exceeding a proper speed limit, in saying in reference to him: "There is no evidence that he did not proceed carefully; but, at any rate, he proceeded." Standing alone, this sentence might be open to such charge; but, when this statement is considered in the light of the whole charge, it did not have the effect complained of. The jury were instructed, if the signal gave Baker the right to go ahead, and assured him he had a clear track, still "he was required to use the ordinary and usual care, even under those circumstances." Attention was called to the fact that, while there was no evidence of Baker's negligence in running the train (by which we understand the court referred to his handling the engine, keeping lookout, etc.), "there is evidence that he was going at the rate of 15 miles an hour." After reciting the conflicting testimony on that point, the court then left to the jury what inference was to be drawn by the inquiry:

"Is there any evidence from which the inference could be drawn that Henry K. Baker was negligent in the way and at the speed he ran his train?"

And following this the jury was told:

"If you find from the evidence he was not negligent, but that there was negligence on the part of either the man in the tower or the crew running the shifting engine, and if there was negligence of either or both together, then this company would be responsible for the death of Henry K. Baker under the law."

Under this charge we think the questions involved were fairly submitted, and the judgment should be affirmed.

(155 Fed. 897.)

OMAHA PACKING CO. v. SANDUSKI.

(Circuit Court of Appeals, Eighth Circuit. July 22, 1907.)

No. 2,585.

1. MASTER AND SERVANT—INJURY OF SERVANT—EVIDENCE OF MASTER'S NEGLIGENCE.

The mere fact that an accident happened by which a servant was injured does not itself create a presumption of negligence on the part of the master, and, where negligence is charged as a ground for recovery by the servant against the master, the burden is upon the plaintiff to show that by some act or omission the defendant violated some duty he owed to the plaintiff which caused the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 881, 895.]

2. SAME—DUTY OF MASTER—SAFE PLACE TO WORK.

The rule which makes it the positive duty of a master to exercise reasonable care to provide a servant with a reasonably safe place in which to work, even if it extends to providing a reasonably safe mode of entrance to and exit from the place where the workmen are employed, is not applicable to a case where the place becomes dangerous in the progress of the work either necessarily or from the manner in which the work is done.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 550.]

3. SAME—CONDITION OF WAY.

Plaintiff was employed on the third floor of defendant's packing house, which was reached by an outside stairway running up from a platform, 10 to 14 feet wide, extending along the side of the building. This platform was used by other employes in conveying meat on trucks from one part of the building to another, and there were more or less drippings from the trucks which in cold weather froze upon the platform. After plaintiff had been so employed for three years, in walking along the platform from the stairway in going from work one night in the winter, he slipped on the platform, and was injured. *Held* that, assuming that the fall was caused by ice resulting from such drippings, it was not due to any neglect or breach of duty on the part of defendant, but to a cause the risk from which was known to and assumed by plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 610.]

In Error to the Circuit Court of the United States for the District of Nebraska.

Ralph W. Breckenridge (Charles J. Greene, on the brief), for plaintiff in error.

Constantine J. Smyth (Edward P. Smith, on the brief), for defendant in error.

Before VAN DEVANTER and ADAMS, Circuit Judges, and RINER, District Judge.

RINER, District Judge. This is an action to recover damages for personal injuries alleged to have been suffered by the defendant in error by reason of the negligence of the plaintiff in error.

Louis Sanduski, plaintiff in the court below (referred to hereinafter as the plaintiff), at the time of his alleged injuries, January 20, 1906, was in the employ of the Omaha Packing Company, defendant in the court below (referred to hereinafter as the defendant), in its

packing house, located at South Omaha, in the hog casing room, or department, and had been so employed for about three years. The room where the plaintiff worked was located in the third story of the building, connected with the defendant's packing plant and accessible from the street by means of a platform and stairway. The platform was 600 feet long, and between 10 and 14 feet wide. There is some conflict in the evidence as to its exact width. The platform, where it connected with the stairway leading up on the outside of the building to the door of the room where Sanduski worked, was between 10 and 15 feet above the ground. John Tnczar, a witness for the plaintiff, testified that it was "maybe 10 and maybe 12" feet from the foot of the stairs to the edge of the platform. There was a railing along the outside of the stairway, but no railing on the platform. It had, however, two pieces of two by four timber spiked to the edge of it. The platform sloped slightly toward the building; the outer edge being about three inches higher than the inner edge. The platform was used, not only as a passageway for employes going to and from their work, but also for trucking the product of the plant, as one of the witnesses puts it, "from the beef house to the tank room," located at different points along the platform, and had been so used during the entire time of plaintiff's employment. The testimony shows that in this trucking process, if there was anything wet in the product conveyed by the trucks, the water would drip off on the platform, and that there usually was water dripping from the product carried on the trucks. All of this was known to the plaintiff. He testified that he knew the platform was used by truckers every day, in cold as well as warm weather, and that water dripped off the meat carried on the trucks onto the platform, and that during his entire term of service he had used this platform and stairway as a passageway in going to and from his work, sometimes during the day time and at other times after dark.

As to the condition of the platform on the morning when plaintiff went to work, the testimony is not altogether clear. Tnczar, who went to work about the same time plaintiff did, testified that he did not see any ice on the platform. Zalinski, another witness, could not say whether there was ice on the platform in the morning. Plaintiff at first said there was ice on the platform, but subsequently said he did not notice whether the platform was frozen or not in the morning. Plaintiff testified that on the day of his injury he went to work in the morning about 6:45, and quit work at about 6:30 in the evening; that it was dark both when he went to work in the morning and when he quit in the evening; that he descended the stairs on the outside of the building leading from the third story down to the platform; that he took a few steps after reaching the platform, when he slipped, and that was all he knew. He testified also that the night was foggy. He could not say whether there was ice on the platform, but stated that he felt "under his feet it was kind of slippery, but not long, and slipped, and that is all he knew." The record does not disclose who found him when he was picked up, or the condition in which he was found. Both Tnczar and Zalinski testified that there was ice in ridges on that part of the platform where they trucked beef, and, when asked how high these ridges were, said they were small. Tnczar further testi-

fied that the ice came there from the water dripping from the product carried on the trucks and that the ridges were made by the trucks.

The theory upon which the plaintiff sought to recover in this case was that the defendant was negligent, in that it had failed to use reasonable care to provide him with a reasonably safe place in which to work, and it is contended by counsel in their brief that this duty of the master extends to a reasonably safe mode of entrance to and exit from the place where the servant was employed. Conceding, for the purposes of this case, that the rule in regard to the master's duty to his servant is as broad as contended for by counsel, yet we think there can be no recovery upon the facts as they are presented by this record. Both the platform and stairway were open and exposed. No one knew better than the plaintiff the manner in which the business was carried on there. He knew that this platform was used daily by men trucking the product of the plant from the beef house to the tank room, and that the drippings fell from the trucks upon the platform. He had been coming and going back and forth to his work almost daily over this platform for about three years, as had the other workmen, and that it was, as one of the witnesses described it, "one of the most traveled ways in the establishment."

It is not contended that there was any defect in the platform itself, but it is sought to charge the defendant with liability upon the sole ground that drippings from the product carried on the trucks on that particular day were permitted to freeze upon the platform, thus making it slippery. The plaintiff must have known the weather conditions before reaching the platform, because he had descended the stairway, which was open and exposed, from the third story of the building, down to the platform, and, if the weather was cold enough to form ice, he must have known that he would necessarily find that portion of the platform, over which the trucking was done, to some degree in a slippery condition, and that it devolved upon him to use more care than at other times when the weather conditions were more favorable.

The mere fact that an accident happened does not of itself create a presumption of negligence on the part of the defendant. Where negligence is charged as a basis of recovery, the burden is upon the plaintiff to show that by some act or omission the defendant has violated some duty which he owed to the plaintiff and which caused the injury complained of. The rule is stated by this court in *Northern Pac. Ry. Co. v. Dixon*, 139 Fed. 737, 71 C. C. A. 555, as follows:

"The mere happening of an accident which injures a servant falls to indicate whether it resulted from one of the causes the risk of which is the servant's, or from one of those the risk of which is the master's; and for this reason it raises no presumption that it was caused by the negligence of the latter. In such cases the burden of proof is always upon him who avers that the negligence of the master caused the accident to establish that fact, and a naked finding, as in this case, that the accident occurred and that the servant was guilty of no negligence which contributed to cause his injury, is insufficient to sustain this burden, for there are many other causes than the negligence of the master and that of the servant, such as the negligence of fellow servants and latent and undiscoverable defects in place or machinery, which may have produced it." *Chicago & N. W. Ry. Co. v. O'Brien*, 132 Fed. 593, 67 C. C. A. 421, and cases there cited.

Neither is the rule which makes it the positive duty of the master to provide the servant a reasonably safe place in which to work, even if it extends to providing a reasonably safe mode of entrance to and exit from the place where the workmen are employed, applicable to a case where the place becomes dangerous in the progress of the work, either necessarily or from the manner in which the work is done. In this case, if this platform became dangerous during the day, it was by reason of this trucking carried on in the progress of the work, either necessarily or from the manner in which the work was done by other employes, fellow servants of the plaintiff, engaged in the same general business, and, if the platform became dangerous through their negligence, that was one of the risks which the plaintiff assumed when he entered the defendant's employment. In *Deye v. Lodge & Shipley Mach. Tool Co.*, 137 Fed. 480, 70 C. C. A. 64, the court said:

"Unless the business be of such a complex and dangerous character as to require that it shall be conducted upon a system or scheme, in order to secure the orderly conduct of the business and the safety of those engaged in it, the master's obligation to supply a safe place for his work to be done, and to keep it safe, does not impose the duty of always keeping it in a safe condition so far as its safety depends upon the proper performance of the very work which his servants have there undertaken to do. If a negligent manner of doing the work makes the place less safe, that is one of the risks which all engaged in the work have assumed as a risk of the occupation." *American Bridge Company v. Seeds*, 144 Fed. 605, 75 C. C. A. 407; *City of Minneapolis v. Lundin*, 58 Fed. 525, 7 C. C. A. 344.

In any aspect, therefore, in which the case may be viewed, on the facts disclosed by this record, we think the plaintiff was not entitled to recover.

The judgment of the Circuit Court is reversed, with directions to grant a new trial.

(155 Fed. 945.)

GREAT NORTHERN RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. September 23, 1907.)

No. 2,603.

1. STATUTES—GENERAL REPEALING CLAUSE.

A clause generally repealing "all laws and parts of laws in conflict with" the act of which it is part repeals nothing that would not be equally repealed without it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 225.]

2. SAME—LATER ACT COVERING WHOLE SUBJECT OF PRIOR ONE.

The rule that a later act, covering the whole subject of a prior one and embracing new provisions, plainly showing that it was intended as a substitute, operates by implication to repeal the prior act, is subject to the qualification that where the later act expresses the extent to which it is intended to repeal prior laws, as by a clause repealing all laws and parts of laws in conflict therewith, it excludes any implication of a more extended repeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 229.]

Repeal of statutes by implication, see note to *First Nat. Bank of Butte v. Weidenbeck*, 38 C. C. A. 136.]

3. SAME—RE-ENACTMENT WITH AMENDMENTS.

Statute law is not abrogated or annulled by mere re-enactment or repetition; and when, for purposes of enlargement, contraction, or otherwise, a statute is re-enacted or repeated with amendments, the amendatory act is to be regarded as an affirmation and continuation of the prior law, in so far as in substance and operation it is the same, and is to be regarded as new legislation only in so far as in substance or operation it differs from the prior law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 241.]

4. CARRIERS—REBATES—SECTION 1 OF ELKINS ACT (32 STAT. 847) NOT WHOLLY REPEALED BY HEPBURN ACT (34 STAT. 584).

In so far as section 1 of the Elkins act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]), provided for the punishment of acts of corporate carriers in knowingly offering, granting, or giving, as also the acts of corporate shippers in knowingly soliciting, accepting, or receiving, rebates, concessions, or discriminations from the legal rates and tariffs, it was not abrogated or repealed by the Hepburn act (Act June 29, 1906, c. 3591, 34 Stat. 584), but was preserved and continued; and in so far as it provided for the punishment of such acts, when not knowingly done—assuming, but without deciding, that it did so provide—it was repealed.

5. STATUTES—CONGRESS CANNOT LIMIT MANNER IN WHICH ITS WILL SHALL BE MANIFESTED IN THE FUTURE.

While Congress may prescribe rules affecting the construction of after-legislation, which does not in terms, or by necessary implication, show that it is to be unaffected by them, these rules cannot be so framed as to defeat the plain intention of after-legislation, and, like other statutes, they cease to be effective when plainly or necessarily in conflict with a later manifestation of the legislative will.

6. SAME—REV. ST. § 13, CONSTRUED.

As applied to subsequent repealing acts which do not expressly, or by necessary implication, contravene its provisions, Rev. St. § 13 [U. S. Comp. St. 1901, p. 6], prescribing the effect of a repealing act upon existing penalties, forfeitures, and liabilities, is effective and obligatory upon the courts; but beyond this it is without effect and not obligatory upon any one. Notwithstanding its enactment, Congress remained at liberty to legislate respecting its subject-matter in any manner they might choose.

7. SAME—INTENTION IS CONTROLLING, THOUGH RESTING ONLY IN NECESSARY IMPLICATION.

The intention of the Legislature constitutes the law, and may be as effectually manifested by what is necessarily implied as by what is expressed; and, where there are conflicting manifestations of the legislative will, the last is controlling, even though it rests in necessary implication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 264.]

8. SAME—REPEAL BY IMPLICATION.

To establish a supersession or repeal of a statute by implication, it is not sufficient to show merely that a later statute, making no mention of the particular subject of a prior one, employs language broad enough to cover some part or all of it; for, as words are sometimes employed with less than their largest literal meaning, it must also appear that the two statutes cannot stand together, reasonable purpose and operation being accorded to each. Particularly is this true if the prior statute expresses a settled policy in legislation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 230.]

9. CARRIERS—REBATES—DISCRIMINATION—REV. ST. § 13, NOT SUPERSEDED BY SPECIAL SAVING CLAUSE IN HEPBURN ACT (34 STAT. 584).

The special saving clause in section 10 of the Hepburn act (Act June 29, 1906, c. 3591, 34 Stat. 595), does not mention the particular subject of the general saving clause in Rev. St. § 13 [U. S. Comp. St. 1901, p. 6], namely, the effect upon existing penalties, forfeitures, and liabilities of a repealing act, and can be accorded reasonable operation, consistently with the true intendment of its language and with the undisturbed operation of the general saving clause, by treating it as saving causes then pending in the courts of the United States from what, in its absence, and in the presence of the general saving clause, would be the effect upon them of the amendments provided for in that act. Consequently it does not by necessary implication supersede the general saving clause or impinge upon its field of operation.

(Syllabus by the Court.)

In Error to the District Court of the United States for the District of Minnesota.

William R. Begg and Rome G. Brown (Charles S. Albert, on the brief), for plaintiff in error.

Charles C. Houpt, U. S. Atty. (Paul A. Ewart, Asst. U. S. Atty., on the brief), for defendant in error.

Thomas Wilson, H. S. Priest, and F. W. Lehmann, amici curiæ.

Before VAN DEVANTER and ADAMS, Circuit Judges, and RINER, District Judge.

VAN DEVANTER, Circuit Judge. This writ of error challenges a judgment of conviction in a criminal case whereby the Great Northern Railway Company, a Minnesota corporation engaged as a common carrier in the transportation of property wholly by railroad from points in Minnesota to points in the state of Washington, was sentenced to pay a fine of \$1,000 for each of 15 violations of section 1 of the act of February 19, 1903 (32 Stat. 847, c. 708 [U. S. Comp. St. Supp. 1905, p. 599]), known as the "Elkins Act," which declared, *inter alia*:

"And it shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate com-

merce and the acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. Every person or corporation who shall offer, grant, or give or solicit, accept or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars."

These violations were charged in an indictment returned November 8, 1906, and, as was alleged therein and admitted upon the trial, were committed in the months of May, June, July, and August, 1905, and consisted in granting and giving to the W. P. Devereux Company, a shipper of oats and corn in car load shipments from Minneapolis, Minn., to points in the state of Washington, over the defendant's railroad, concessions of 15, 18, and 20 cents per 100 pounds from the legal rate of 50 cents per 100 pounds named in the tariffs applicable to such shipments, as published and filed with the Interstate Commerce Commission by the defendant. Intermediate the commission of the offense and the returning of the indictment, Congress passed Act June 29, 1906, c. 3591, 34 Stat. pp. 584, 838, known as the "Hepburn Act," and the chief objection interposed by the defendant to its prosecution and punishment was that section 1 of the Elkins act, against which it had offended, was repealed by the Hepburn act in a manner which left no provision of law for the prosecution and punishment of offenses against the repealed statute, save where prosecutions therefor were pending in the courts of the United States at the time of the repeal. The district court overruled the objection (151 Fed. 84), and it is now very earnestly and forcefully pressed upon our consideration.

Does the Hepburn act repeal the whole or any part of section 1 of the Elkins act?

The title of the Hepburn act, "An act to amend an act entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," is so general that it gives no support to the claim of a repeal. Nor does that claim have any support in the general repealing clause in section 10, "All laws and parts of laws in conflict with the provisions of this act are hereby repealed," for it repeals nothing which would not be repealed equally without it. *State v. Drexel* (Neb.) 105 N. W. 174; *State v. Yardley*, 95 Tenn. 546, 558, 32 S. W. 481, 34 L. R. A. 656; *Struthers v. People*, 116 Ill. App. 481; *Pierce v. Commercial Investment Co.*, 30 Wash. 272, 70 Pac. 496; *District of Columbia v. Sisters of Visitation*, 15 App. D. C. 300, 308. As said by Sutherland, Stat. Con. (2d Ed.) § 247:

"Subsequent legislation repeals previous inconsistent legislation, whether it expressly declares such repeal or not. In the nature of things it would be so, not only on the theory of intention, but because contradictions cannot stand together."

If there be a repeal, it is solely because section 2 of the Hepburn act declares that section 1 of the Elkins act "be amended so as to read as follows," and then reproduces it with some omissions and additions,

which is the same thing, in legal effect, as saying that the section is amended by striking out what is omitted and by inserting at designated places what is added. In the absence of a constitutional restriction—and there is none in the Constitution of the United States—the amendment of existing statutes may be effectually accomplished in either of these ways, and they have been employed interchangeably by Congress.

Generally speaking, where a statute is amended “so as to read as follows,” or is re-enacted with changes, or is in terms repealed and simultaneously re-enacted with changes, the amendatory or re-enacting act becomes a substitute for the original, which then ceases to have the force and effect of an independent enactment; but this does not mean that the original is abrogated for all purposes, or that everything in the later statute is to be regarded as if first enacted therein. On the contrary, the better and prevailing rule is that so much of the original as is repeated in the later statute without substantial change is affirmed and continued in force without interruption, that so much as is omitted is repealed, and that any substantial change in other portions, as also any matter which is entirely new, is operative as new legislation. In Sutherland on Statutory Construction (2d Ed.) § 237, it is said of an amendment “so as to read as follows”:

“The amendment operates to repeal all of the section amended not embraced in the amended form. The portions of the amended section which are merely copied without change are not to be considered as repealed and again enacted, but to have been the law all along; and the new parts or the changed portions are not to be taken to have been the law at any time prior to the passage of the amended act. The change takes effect prospectively according to the general rule.”

And in the succeeding section it is said of a simultaneous repeal and re-enactment:

“Where there is an express repeal of an existing statute, and a re-enactment of it at the same time, or a repeal and a re-enactment of a portion of it, the re-enactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where the re-enactment takes effect at the same time. The intention manifested is the same as in an amendment enacted in the form noticed in the preceding section. Offices are not lost, corporate existence is not ended, inchoate statutory rights are not defeated, a statutory power is not taken away, nor pending proceedings or criminal charges affected by such repeal and re-enactment of the law on which they respectively depend.”

The subject has been considered several times by the Supreme Court, and always with the same result. *Steamship v. Joliffe*, 2 Wall. 450, 458, 17 L. Ed. 805, involved the right of a port pilot to collect half pilotage fees for services proffered and declined, and during the pendency of the action the statute giving the right was in terms repealed and at the same time substantially re-enacted; the new act allowing half pilotage fees in the same circumstances as the original. The court held that the new act did not impair the right to fees which had arisen under the original, saying:

“The new act took effect simultaneously with the repeal of the first act. Its provisions may, therefore, more properly be said to be substituted in the place of, and to continue in force with modifications, the provisions of the original act, rather than to have abrogated and annulled them.”

Murdock v. Memphis, 20 Wall. 590, 617, 22 L. Ed. 429, to which we will refer again, related to a revisory and substituted act, which, it was said, was a new law in so far as it differed from the original, and in so far as it embraced portions of the original was a preservation of them. *Bear Lake Irrigation Co. v. Garland*, 164 U. S. 1, 11, 17 Sup. Ct. 7, 9, 41 L. Ed. 327, related to an act which expressly repealed and at the same time substantially re-enacted a prior one, and of this it was said:

"Upon comparing the two acts of 1888 and 1890 together, it is seen that they both legislate upon the same subject, and in many cases the provisions of the two statutes are similar and almost identical. Although there is a formal repeal of the old by the new statute, still there never has been a moment of time since the passage of the act of 1888 when these similar provisions have not been in force. Notwithstanding, therefore, this formal repeal, it is, as we think, entirely correct to say that the new act should be construed as a continuation of the old with the modification contained in the new act. This is the same principle that is recognized and asserted in *Steamship Co. v. Joliffe*."

Holden v. Minnesota, 137 U. S. 483, 490, 494, 11 Sup. Ct. 143, 146, 147, 34 L. Ed. 734, was a criminal case involving the infliction of the death penalty. After the commission of the offense and before the indictment of the offender a statute was adopted which substantially re-enacted or repeated the provisions of the previous law relating to the mode of inflicting that penalty and to the issuing of the governor's warrant therefor. It also contained new provisions imposing solitary confinement after the issuance of the warrant and regulating the details of the execution, and in terms repealed all acts and parts of acts inconsistent with it. Responding to the contention that the previous law was thereby repealed, and that the new act could not be applied to prior offenses, the court, in addition to holding that the new provision for solitary confinement, although not in terms so written, was applicable only to future offenses, held that the previous law was not repealed, and in that connection said:

"These provisions were not repealed by the act of April 24, 1889 (Gen. Laws Minn. 1889, p. 66, c. 20). In respect to the first and second sections of that act, it is clear that they contain nothing of substance that was not in sections 11 and 12 of chapter 118 of the General Statutes of 1878. And it is equally clear that the provisions of an existing statute cannot be regarded as inconsistent with a subsequent act merely because the latter re-enacts or repeats those provisions. As the act of 1889 repealed only such previous acts and parts of acts as were inconsistent with its provisions, it is inaccurate to say that that statute contained no saving clause whatever. By necessary implication, previous statutes that were consistent with its provisions were unaffected."

And again:

"The provisions of the previous law, as to the nature of the sentence, the particular mode of inflicting death, and the issuing by the Governor of the warrant of execution before the convict was hung, were, therefore, not repealed, although some of them were re-enacted or repeated in the statute of 1889, and other provisions relating merely to the time and mode of executing the warrant, but not affecting the substantial rights of the convict, were added."

The rule announced in these cases was again recognized by the Supreme Court in *Campbell v. California*, 200 U. S. 87, 92, 26 Sup. Ct. 182, 50 L. Ed. 382, and was recently applied by us in *Lamb v. Pow-*

der River Live Stock Co., 65 C. C. A. 570, 132 Fed. 434, 67 L. R. A. 558. It has also been quite generally recognized and applied in the state courts. Instances of its application to civil statutes are shown in the following cases: *Wright v. Oakley*, 5 Metc. (Mass.) 400, 406; *United Hebrew Benevolent Ass'n v. Benshimol*, 130 Mass. 325; *St. Louis v. Alexander*, 23 Mo. 483, 509; *Ely v. Holton*, 15 N. Y. 595; *Anding v. Levy*, 57 Miss. 51, 59, 34 Am. Rep. 435; *Fullerton v. Spring*, 3 Wis. 667, 671; *Glentz v. State*, 38 Wis. 549; *Burwell v. Tullis*, 12 Minn. 572, 575 (Gil. 486); *Gaston v. Merriam*, 33 Minn. 271, 283, 22 N. W. 614; *State ex rel. v. Baldwin*, 45 Conn. 134, 144; *People v. Board of Equalization*, 20 Colo. 220, 231, 37 Pac. 964; *Moore v. Kenockee Tp.*, 75 Mich. 332, 42 N. W. 944, 4 L. R. A. 555; *Capron v. Strout*, 11 Nev. 304, 310; *McMullen v. Guest*, 6 Tex. 275. And instances of its application to criminal statutes are shown in the following: *Commonwealth v. Herrick*, 6 Cush. (Mass.) 465; *State v. Gumber*, 37 Wis. 298; *State v. Wish*, 15 Neb. 448, 19 N. W. 686; *State v. Miller*, 58 Ind. 399; *Sage v. State*, 127 Ind. 15, 26 N. E. 667; *State v. Kates*, 149 Ind. 46, 48 N. E. 365; *State v. Herzog*, 25 Minn. 490; *State v. Prouty*, 115 Iowa, 657, 662-665, 84 N. W. 670; *State v. Williams*, 117 N. C. 753, 23 S. E. 250; *State v. Brewer*, 22 La. Ann. 273; *Territory v. Ruval (Ariz.)* 84 Pac. 1096; *Junction City v. Webb*, 44 Kan. 71, 23 Pac. 1073. See, also, *Bishop Stat. Cr.* (3d Ed.) §§ 152a, 181.

Reference to the point in judgment in some of these cases will illustrate the extent of the rule which they recognize and apply. *Commonwealth v. Herrick* was a prosecution for the sale of spirituous liquor by retail, in violation of a statute which was amended, after the date of the offense, by striking out the word "spirituous" and inserting "intoxicating" in its stead. It was held, Chief Justice Shaw delivering the opinion, that, as the substituted word included all that was covered by the other, and more, the intent manifestly was, not to affect cases theretofore within the statute, but to bring another class within its operation, and that as to the latter it was a new law, but as to the former its continuity was not broken. *State v. Gumber* was a prosecution under a statute declaring that all "places of public resort, where intoxicating liquors are sold in violation of law, shall be shut up and abated as public nuisances upon conviction of the keeper thereof, who shall be punished" by a fine and imprisonment. Pending the prosecution the statute was expressly repealed, and at the same time was re-enacted without any provision for a fine or imprisonment. The court, after referring to the rule that the effect of the repeal of a statute and its re-enactment at the same time is to continue it in uninterrupted operation, and after observing, "And we cannot perceive that it makes any difference whether the statute be a civil or a penal one, for it is wholly a question of legislative intent, which is as manifest and clear in the one case as the other," held that upon the defendant's conviction his saloon could be closed up and abated as a public nuisance and the costs of the prosecution imposed upon him, but that no fine or imprisonment could be imposed, because the provision for that part of the original punishment had not been re-enacted, and therefore was repealed. *State v. Wish* was a prosecution for horse stealing

under a statute which, after the date of the offense, was expressly repealed and at the same time re-enacted with such changes in its phraseology that the maximum imprisonment was reduced from 15 years to 10 and the minimum from 3 years to 1. After referring to the rule that upon the unconditional repeal of a criminal statute the power to punish violations thereof is taken away, the court said:

"But does this rule apply when in fact the statute has not been repealed? There would seem to be a material difference between repealing a statute and leaving nothing in its place, and simply repealing it so far as to avoid an apparent conflict between the original and amended sections of the act. In the one case the power would be entirely gone, while in the other no instant of time had passed between the repeal of the old and the taking effect of the new. The repealing act re-enacts the provisions of the old statute in its very language in all respects, except in reducing the imprisonment. We hold, therefore, that where the re-enactment is in the words of the old statute, and was evidently intended to continue in force the uninterrupted operation of such statute, the new act or amendment is a mere continuation of the former act, and is not in a proper sense a repeal."

State v. Miller was a prosecution for grand larceny; the property taken being a watch of the value of \$23. Under section 19 of the act of 1852, in force at the date of the offense, grand larceny consisted in the stealing of personal goods of another of the value of \$5 or upwards, and pending the prosecution the statute was by an amendatory act repeated in its original terms, save that the element of value was changed from \$5 or upwards to \$15 or upwards. The court held that the original section was not wholly repealed, saying:

"The amended statute in question is not inconsistent with the statute as it was before amendment, so far as it is applicable to the case under consideration. The only change made by the amendment was to fix the amount constituting grand larceny at \$15, instead of \$5. The law under both statutes made the stealing of \$20 and upwards grand larceny. There has not been a moment, since the coming into force of the act of 1852, that the statute law of this state has not made the stealing of the amount charged in the indictment in this case grand larceny, and contained the same provisions as to the punishment thereof. It is clear to us that the lawmaking power never intended the repeal of the entire section 19, above mentioned, and that no rule of construction of statutes requires this court to hold that it is repealed."

In Sage v. State the accused was convicted as an accessory before the fact to the crime of murder in the first degree. At the date of the offense the statute read:

"Every person who shall aid or abet in the commission of any felony, or who shall counsel, encourage, hire, command, or otherwise procure such felony to be committed, shall be deemed an accessory before the fact, and may be tried and convicted in the same manner as if he were a principal, and either before or after the principal offender is convicted, and charged or indicted, and upon such conviction shall suffer the same punishment and penalties as are prescribed by law for the punishment of the principal."

It was thereafter re-enacted in an amendatory act with such changes in its phraseology that, while the elements of the crime and the punishment remained the same, the name given to the offense in the original statute was omitted, and some changes were made in the matter of the procedure or remedy. In sustaining the conviction, it was held that, though in a sense such an amendatory act supersedes the act which it

amends, it does not completely repeal or destroy it for all purposes; and it was added:

"Principle forbids the conclusion that an amendatory statute, defining an offense in substantially the same language as that employed in the statute it amends, takes away the right of the state to prosecute the offender and requires his unconditional discharge. It cannot be logically affirmed, where the same offense is defined in the same way by both the earlier and the later statute, that there is an interregnum in which there was no law defining the offense. The two acts interfuse and blend so fully and compactly that it is impossible that there can be an interval when there was no law. Between the two acts there is no period of intervening time in which no offense existed."

State v. Herzog was a prosecution under the following statute:

"If any officer, agent, clerk or servant of any incorporated company, or if any clerk, agent, or servant of any private person, or of any copartnership, except apprentices and other persons under the age of sixteen years, embezzles or fraudulently converts to his own use, or takes and secretes with intent to embezzle and convert to his own use, without consent of his employer or master, any money or property of another which has come to his possession or is under his care *by virtue of such employment*, he shall be deemed to have committed larceny."

After the date of the offense the statute was amended so as to read as follows:

"If any officer, agent, clerk or servant of any incorporated company, or if any clerk, agent or servant of any private person, or of any copartnership, except apprentices and other persons under the age of sixteen years, *or if any attorney at law, collector or other person who in any manner receives or collects money or any other property for the use of and belonging to another,* embezzles or fraudulently converts to his own use, or takes and secretes with intent to embezzle and convert to his own use, without the consent of his employer, master, *or the owner of the money or goods collected or received,* any money or property of another, *or which is partly the property of another and partly the property of such officer, agent, clerk, servant, attorney at law, collector, or other person,* which has come to his possession or under his care *in any manner whatsoever,* he shall be deemed to have committed larceny; *and in a prosecution for such crime, it shall be no defence that such officer, agent, clerk, servant, attorney at law or other person was entitled to a commission out of such money or property, as commission for collecting or receiving the same for and on behalf of the owner thereof: provided, that it shall be no embezzlement on the part of such agent, clerk, servant, attorney at law, collector, or other person to retain his reasonable collection fee on the collection.*"

For the purpose of showing in what respects the amended statute differed from the original, we have italicized those words of each not found in the other. In affirming the conviction of the accused, notwithstanding the changes in the law, it was pointed out that, save where the accused was entitled to a commission out of the money or property embezzled, etc., the amended statute covered in exactly the same way the offenses described in the original, and it was said that:

"With regard to the offenses described in the latter, in a case in which the defense spoken of does not exist, the law is wholly unaffected by the changes made by the former, and continues to be exactly what it was before the changes were made. As respects such offenses, the original section is not repealed, abrogated, changed, or amended, but simply preserved and continued; for there never has been a moment of time since its adoption when the rule of law announced by it did not exist. So long as this rule, which is ap-

plicable to a certain class of cases, remains unchanged, it is not at all important that the amendment effected by the amended section provides for and adds other classes of cases. The law as to the original offenses, save when the defense mentioned exists, is the same in every respect."

Territory v. Ruval was a prosecution for grand larceny under a statute which, after the date of the offense, was re-enacted in an amendatory act so as to enlarge the enumeration of property subject to that offense. The amendatory act also contained a clause in terms repealing all acts and parts of acts inconsistent with it. The property stolen, a gelding, was within the enumeration in both the original and the amendatory act, and the prosecution was sustained, because the original was neither inconsistent with nor repealed by the amendatory act, but was merely enlarged to include a class of cases not before within its operation.

In support of the contention that by its re-enactment, with modifications, section 1 of the Elkins act was entirely repealed, and hence no prosecution for prior violations of its inhibitions respecting rebates, concessions, and discriminations could be instituted thereafter "against either an individual or a corporation," counsel for the railway company rely upon such cases as *Norris v. Crocker*, 13 How. 429, 14 L. Ed. 210, *United States v. Tynen*, 11 Wall. 88, 20 L. Ed. 153, *Murdock v. Memphis*, 20 Wall. 590, 22 L. Ed. 429, *United States v. Claflin*, 97 U. S. 546, 24 L. Ed. 1082, 1085, *Pana v. Bowler*, 107 U. S. 529, 538, 2 Sup. Ct. 704, 27 L. Ed. 424, *Tracy v. Tuffly*, 134 U. S. 206, 229, 10 Sup. Ct. 527, 33 L. Ed. 879, and *Murphy v. Utter*, 186 U. S. 95, 22 Sup. Ct. 776, 46 L. Ed. 1070, from which they deduce the conclusion that where a later act covers the whole subject of a prior one, and embraces new provisions plainly showing that it was intended as a substitute, it operates by implication, and without any repealing clause, as an unqualified repeal of the whole of the prior act. In our opinion there are two insuperable objections to this position: First, the repealing clause in the Hepburn act, "All laws and parts of laws in conflict with the provisions of this act are hereby repealed," expresses the extent to which it was intended to repeal prior laws, and excludes any implication of a more extended repeal. *Henderson's Tobacco*, 11 Wall. 652, 656, 20 L. Ed. 235; *Holden v. Minnesota*, 137 U. S. 483, 491, 11 Sup. Ct. 143, 34 L. Ed. 734; *Patterson v. Tatum*, 18 Fed. Cas. No. 10,830; *Gaston v. Merriam*, 33 Minn. 271, 283, 22 N. W. 614; *Lewis v. Stout*, 22 Wis. 234; *People v. Huntley*, 112 Mich. 569, 578, 71 N. W. 178. And, next, the cases relied upon do not hold that a revisory or substituted act, which literally or substantially re-enacts or repeats portions of the original, is, in respect of them, new legislation, rather than an affirmation and continuation of existing law; nor is there any reason to believe that they restrain or qualify the ruling in *Steamship Co. v. Joliffe*, *Bear Lake Irrigation Co. v. Garland*, and *Holden v. Minnesota*, *supra*. What they do hold—general expressions being read in the light of the questions necessary to be determined—is that a later act covering the whole subject of a prior one, and embracing new provisions plainly showing that it was intended as a substitute, supersedes the prior act, in the sense of embracing all thereof that was intended to be preserved, omitting what was not so intended,

and changing what was intended to be changed, and so prevents the two from being regarded as in any respect coexistent or cumulative enactments. In this there is nothing at all inconsistent with what otherwise is clear; that is, that the intention in such a case is to make a new law only in so far as the substituted act differs from the original. And such is plainly the necessary conclusion from what was said in *Murdock v. Memphis*, 20 Wall. 590, 617, 22 L. Ed. 429, one of the cases relied upon. The question there presented was one of the effect upon the twenty-fifth section of the judiciary act of September 24, 1789 (1 Stat. 85, c. 20), produced by the second section of the amendatory act of February 5, 1867 (14 Stat. 386, c. 28), which re-enacted or repeated the former, with some changes and omissions, but contained no repealing clause. Of this it was said:

"A careful comparison of these two sections can leave no doubt that it was the intention of Congress, by the latter statute, to revise the entire matter to which they both had reference, to make such changes in the law as it stood as they thought best, and to substitute their will in that regard entirely for the old law upon the subject. We are of opinion that it was their intention to make a new law so far as the present law differed from the former, and that the new law, embracing all that was intended to be preserved of the old, omitting what was not so intended, became complete in itself, and repealed all other law on the subject embraced within it. The authorities on this subject are clear and uniform. The result of this reasoning is that the twenty-fifth section of the act of 1789 is technically repealed, and that the second section of the act of 1867 has taken its place. What of the statute of 1789 is embraced in that of 1867 is, of course, the law now, and has been ever since it was first made so. What is changed or modified is the law as thus changed or modified. That which is omitted ceased to have any effect from the day that the substituted statute was approved."

Norris v. Crocker turned entirely upon the question whether, in the absence of a repealing clause, an amendatory and supplementary act covering the whole subject of the original, adding new offenses and prescribing penalties, which were altogether new and more severe, for the offenses enumerated in the original, as well as for the new ones, repealed the original so far as related to the penalty. Of course, it was held that the provisions of the amendatory and supplementary act were repugnant to those of the original in respect of the penalty, and hence there was a repeal to that extent. *United States v. Tynen* was in principle much the same. An amendatory act, covering the whole subject of the original, and adding many new offenses, prescribed for each offense named therein as well those which were old as those which were new, a punishment which was different and more severe, in that its minimum was less, and its maximum greater, than that prescribed in the original. It was held that the two acts were repugnant in this respect, and that the amendatory one operated, without any repealing clause, to repeal the other. *United States v. Claflin* is so nearly like the two cases last mentioned that what has been said of them is also applicable to it. In each the amendatory act failed to re-enact or repeat enough of the original to cover the penalty or punishment for any prior offense, and so there was no occasion to consider or decide whether such portions of the original as were re-enacted or repeated should be regarded as new legislation or as an affirmation and continuance of the prior law. *Pana v. Bowler* and *Tracy v. Tuffly* decided

nothing having application here, other than that a later act, plainly intended to prescribe the only rules that are to govern in respect of the subject covered by a prior one, operates, without any repealing clause, to repeal any provision in that act omitted from the other. And *Murphy v. Utter* is also distinguishable from the cases which we regard as applicable and controlling, as well as from the one now before us. The situation presented in that case was, that a territorial legislature, whose acts were subject to approval, disapproval, or change by Congress, had attempted to repeal one of its prior acts, which in the meantime, had been re-enacted, with some changes, by Congress. No question was presented as to whether, as respected matters transpiring between the original enactment and the re-enactment, such provisions of the former as were repeated in the latter should be regarded as entirely new legislation or as speaking from the date of their original enactment, and the real controversy was as to whether the act of Congress, being paramount as well as later, superseded and took the place of the original territorial act in the sense of disabling the territorial Legislature from subsequently repealing it. It was held that the original was thus superseded and supplanted, and that the office of loan commissioners, created by it and "continued by the act" of Congress, was not terminated by the subsequent territorial repealing act. When the entire opinion is carefully examined, it does not sustain the extensive repeal here claimed.

From this review of adjudged cases, as also from what is deemed the better reasoning, we think the conclusion necessarily follows that statute law is not abrogated or annulled by mere re-enactment or repetition, and that when, for purposes of enlargement, contraction, or otherwise, a statute is re-enacted or repeated with amendments, the amendatory act is to be regarded as an affirmation and continuation of the prior law, in so far as in substance and operation it is the same, and is to be regarded as new legislation only in so far as in substance or operation it differs from the prior law.

As much of section 1 of the Elkins act was re-enacted or repeated by the Hepburn act without any change in substance or operation, we hold that the section was not wholly repealed. And so it becomes necessary to consider whether there was any substantial change in that part of it upon which the prosecution and punishment of the offense here charged depend. For the purpose of illustrating such changes as were made the section is here reproduced, the omitted portions of the original being italicized, the new matter being shown in brackets, and the balance being common to both:

"That anything done or omitted to be done by a corporation common carrier, subject to the act to regulate commerce and the acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said acts or under this act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said acts or by this act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corpora-

tion offending shall be subject to a fine [of] not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory *thereto* [thereof] whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory *thereto* [thereof], or whereby any other advantage is given or discrimination is practiced. Every person or corporation [whether carrier or shipper] who shall [knowingly] offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars. *In all convictions occurring after the passage of this act for offenses under said acts to regulate commerce, whether committed before or after the passage of this act, or for offenses under this section, no penalty shall be imposed on the convicted party, other than the fine prescribed by law, imprisonment, wherever now prescribed as part of the penalty being hereby abolished: [Provided, that any person, or any officer or director of any corporation subject to the provisions of this act, or the act to regulate commerce and the acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.]* Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

"In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier [or shipper] acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier [or shipper] as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory *thereto* [thereof], or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this act.

"[Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of this act, or for whom as consignor or consignee, any such carrier shall transport property from one state, territory, or the District of Columbia to any other state, territory, or the District of Columbia, or foreign country, who shall knowingly by employé, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in this act, shall in addition to any penalty provided by this act forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable con-

sideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction, a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be.]”

Having regard to so much of the section as defines, and prescribes the punishment for, the offense charged in the present indictment, it is seen that the literal changes therein are four in number: First, the insertion of the words “whether carrier or shipper” in the clause specifying those against whom it is directed; second, the insertion of the word “knowingly” in the clause specifying the acts made punishable; third, the omission of the provision that no punishment other than the prescribed fine shall be imposed; and, fourth, the addition, by way of a proviso, of a provision that, when the offender is a person, he shall be liable to imprisonment, or both fine and imprisonment, in the discretion of the court. The first change is an immaterial one, because the language “every corporation or person who shall offer, grant or give, or solicit, accept or receive, any such rebates, concession or discrimination,” as certainly includes both carriers and shippers without the inserted words as with them. As to the second change, we shall assume, but without so deciding, that the contention of counsel for the railway company, acceded to by counsel for the government, that the original definition of the offense included acts not knowingly done, and that the insertion of the word “knowingly” contracts the definition and excludes therefrom acts originally included, is correct. If so, the prior law is repealed in so far as the definition is contracted, and prior offenses falling within the repeal cannot now be prosecuted and punished, save as there may be some general or special saving clause applicable to them. The third and fourth changes are also immaterial here, because the punishment prescribed for corporate offenders, which was only a fine, is not affected by either. And another reason why the third change is immaterial here is that the omitted provision had reference to offenses the original punishment for which, where the offender was a person, included imprisonment, which was not true of the offense charged in this indictment. As to it the only punishment prescribed was a fine, the provision for which is repeated literally. The fourth change is, of course, inapplicable to prior offenses, punishable only by fine at the time of their commission; but whether the provision for imprisonment which it introduces, by way of a proviso, is so far separable from, and independent of, what is re-enacted or repeated, as to have no effect upon the punishment, by fine, of such prior offenses, where committed by persons (see *Holden v. Minnesota*, 137 U. S. 483, 494, 11 Sup. Ct. 143, 34 L. Ed. 734), need not be considered now, because, however that may be, it does not affect the punishment of corporate offenders.

The situation, therefore, is this: Acts of corporate carriers in knowingly offering, granting, or giving, as also acts of corporate shippers in knowingly soliciting, accepting, or receiving, rebates, concessions, or discriminations, are within both the original and the amended defini-

tion of the offense, and the punishment therefor is unchanged. As to them the prior law is not abrogated or repealed, but preserved and continued; and the liability of the offender to prosecution and punishment, whether the offense was committed before or after the amendatory act, is unaffected. But in so far as the original section embraces such acts, when not knowingly done, it is undoubtedly repealed. It is at this point that a question lying within narrow compass, but of more difficulty, is encountered. The indictment, unlike that set forth in the opinion delivered in the District Court, does not, in charging the granting and giving of concessions to the W. P. Devereux Company, use the word "knowingly," or any other term of equivalent import, and so does not state a case falling within the contracted definition of the offense and without the repeal. True, upon the trial it was admitted on behalf of the railway company that these concessions were granted and given by its direction and with its consent; but as the sufficiency of the indictment was challenged by a demurrer and by a motion in arrest of judgment, and as the admission just stated was made under a stipulation that it should not prejudice the right of the railway company to question the sufficiency of the indictment, the correctness of the rulings upon the demurrer and the motion in arrest of judgment must be determined independently of what occurred upon the trial. It therefore becomes necessary to inquire whether there is any general or special saving clause applicable to prior offenses falling without the contracted definition of the offense and within the repeal. This is the more difficult question.

That section 13 of the Revised Statutes [U. S. Comp. St. 1901, p. 6] is such a general saving clause, if not superseded by something in the Hepburn act, is not only plain, but fully conceded. It reads:

"Sec. 13. The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

But it is urged on behalf of the railway company that this general saving clause is superseded, so far as concerns the Hepburn act, by section 10 of that act, which reads:

"Sec. 10. That all laws and parts of laws in conflict with the provisions of this act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law."

It will be observed that the earlier and general statute seems to declare that it shall apply to all cases of repeal, unless the repealing act "expressly" provides that it shall have the effect of releasing or extinguishing penalties for prior offenses, and also that the later and special statute does not contain any such express provision. Because of this it is insisted on behalf of the government that the later act does not come within the qualifying clause of the general statute, and that it is not admissible to inquire whether the later act by necessary implication manifests an intention to release or extinguish penalties for prior offenses. Such would doubtless be the effect of the general statute, if

it were a constitutional provision; but, as it is not, the contention is made untenable by these well-settled propositions: First, Congress cannot thus limit or restrict the manner in which its power shall be exerted, or its intention manifested, in the future (*Cooley's Const. Lim.* [7th Ed.] 174; *Bishop St. Cr.* [3d Ed.] § 147; 2 *Sutherland, St. Con.* [2d Ed.] § 355; *Bloomer v. Stolley*, 3 Fed. Cas. 729, No. 1,559; *Manigault v. Springs*, 199 U. S. 473, 487, 26 Sup. Ct. 127, 50 L. Ed. 274; *Kellogg v. Oshkosh*, 14 Wis. 623, 628; *Brightman v. Kirner*, 22 Wis. 54, 60; *Friend v. Levy* [Ohio] 80 N. E. 1036; *Wall v. State*, 23 Ind. 150, 153; *Davidson v. Witthaus*, 106 App. Div. N. Y. 182, 185, 94 N. Y. Supp. 428; *State v. County Court*, 37 W. Va. 808, 811, 17 S. E. 379; *Gilleland v. Schuyler*, 9 Kan. 569, 580); second, the intention of the Legislature constitutes the law, and may be as effectually manifested by what is necessarily implied as by what is expressed (*Telegraph Co. v. Eyser*, 19 Wall. 419, 427, 22 L. Ed. 43; *Ex parte Yarbrough*, 110 U. S. 651, 658, 4 Sup. Ct. 152, 28 L. Ed. 274; *McHenry v. Alford*, 168 U. S. 651, 672, 18 Sup. Ct. 242, 42 L. Ed. 614); and, third, where there are conflicting manifestations of the legislative will, the last is controlling, even though it rests in necessary implication.

But it is said that, if the general statute be not effective as a limitation or restriction upon Congress, it is at least obligatory upon the courts as a rule of construction binding them to construe every subsequent repealing act, no matter what its necessary implication, as leaving penalties for prior offenses unaffected, unless it expressly provides that it shall have the effect of releasing or extinguishing them. This, however, is but saying that, though Congress is not bound by the general statute in the enactment of later repealing acts, the courts are bound to construe and give effect to them as if Congress were thus bound; in other words, that general statutory rules of construction may be so framed as to defeat the manifest intention of after legislation. We think that the statement of the proposition is its refutation. The intention of the Legislature, as before said, constitutes the law, and necessarily a later act, whatever its form, if only it be unaffected by any constitutional restriction and its meaning be plain, supersedes prior acts in conflict with it. Of course, the Legislature may prescribe rules affecting the construction of after-legislation, which does not, in terms or by necessary implication, show that it is to be unaffected by them; but they cannot be so framed as to defeat the plain intention of such legislation, and, like other statutes, they cease to be obligatory upon the courts when superseded by a later and conflicting manifestation of the legislative will. In short, our conclusion respecting the general statute is this: As applied to subsequent repealing acts, which do not, expressly or by necessary implication, contravene its provisions, it is effective and obligatory upon the courts, but beyond this it is without effect and not obligatory upon any one. Notwithstanding its enactment, Congress remained at liberty to legislate respecting its subject-matter in any manner they might choose. They could change or repeal it, or supersede it, in whole or in part, as to any particular repealing act. They could do any of these things expressly or by necessary implication; and any such change, repeal, or supersession, however made,

would be as obligatory upon the courts as would be the general statute, if it were unaffected by after legislation.

If, therefore, section 10 of the Hepburn act does not expressly or by necessary implication manifest an intention to release or extinguish penalties for prior offenses falling within the repeal, the general statute is very plainly applicable to their enforcement, and requires that the repealed law be treated as continuing in force for that purpose. *United States v. Reisinger*, 128 U. S. 398, 9 Sup. Ct. 398, 32 L. Ed. 480. Section 10 does not expressly mention penalties for prior offenses, or their remission or enforcement. Does it by necessary implication manifest an intention to release or extinguish them, or any of them? The argument advanced in support of an affirmative answer is this: That section contains both a repealing clause and a saving clause. Some purpose must be ascribed to the latter. It can have no other purpose than to prescribe the effect of the repealing portions of the act upon penalties for prior offenses. It declares that penalties for offenses for which prosecutions were then pending in the courts of the United States shall be saved; and by necessary implication, equally effectual, it declares that other penalties shall not be saved, but released or extinguished. If all of this were true of that section, doubtless the conclusion would follow that it impliedly supersedes or repeals, *pro tanto*, the general statute, which was presumptively in the mind of Congress. *State v. Showers*, 34 Kan. 269, 8 Pac. 474. The argument, however, treats section 10 as if it read literally or substantially as follows:

"All laws and parts of laws in conflict with the provisions of this act are hereby repealed, but such repeal shall not release or extinguish any penalty for any offense heretofore committed against such law for which a criminal prosecution is now pending in any court of the United States, and what is repealed shall be treated as still remaining in force for the purpose of sustaining any such pending prosecution for the enforcement of such a penalty."

In fact, it reads in this way:

"Sec. 10. That all laws and parts of laws in conflict with the provisions of this act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law."

Thus the special saving clause, although immediately following a repealing clause, does not in terms refer to a repeal, to penalties for prior offenses, to the remission or enforcement of any of them, or to pending causes for their enforcement, but to "the amendments herein provided for," to "causes now pending in courts of the United States," and to their continued prosecution "in the manner heretofore provided by law." Of course, "amendments" is broad enough to cover the partial repeal of section 1 of the Elkins act, for that was effected through an amendment; and what is said about "causes now pending in courts of the United States" and their continued prosecution is also broad enough to cover the enforcement of penalties for prior offenses embraced in criminal causes then pending in those courts. But does this language plainly or necessarily refer to the effect of the repeal upon the enforcement of penalties for prior offenses? We say plainly or necessarily, because, to establish a supersession or repeal of a statute

by implication, it is not sufficient to show merely that a later statute, making no mention of the particular subject of the first, employs language broad enough to cover some part or all of it; for, as words are sometimes employed with less than their largest literal meaning, it must also appear that the two statutes cannot stand together, reasonable purpose and operation being accorded to each. Particularly is this true if the first expresses a settled policy in legislation. *Wood v. United States*, 16 Pet. 342, 362, 10 L. Ed. 987; *United States v. Gear*, 3 How. 120, 131, 11 L. Ed. 523, 538; *Frost v. Wennie*, 157 U. S. 46, 58, 15 Sup. Ct. 532, 39 L. Ed. 614; *United States v. Healey*, 160 U. S. 136, 146, 16 Sup. Ct. 247, 40 L. Ed. 369; *Rosecrans v. United States*, 165 U. S. 257, 17 Sup. Ct. 302, 41 L. Ed. 708; *United States v. Greathouse*, 166 U. S. 601, 17 Sup. Ct. 701, 41 L. Ed. 1130; *McChord v. Louisville & Nashville R. R. Co.*, 183 U. S. 483, 500, 22 Sup. Ct. 165, 46 L. Ed. 289. Or, as the same thing is at times differently expressed, a statute couched in clear and explicit terms is not overthrown by possible, but not necessary, implications flowing from after legislation. We shall refer briefly to two of the cases just cited, each dealing with a conflict literally more pronounced than that now before us.

United States v. Gear arose under the public land laws. The policy of Congress to reserve from disposition under other laws public lands containing lead mines had long been expressed in Act March 3, 1807, c. 49, § 5, 2 Stat. 449, when Act June 26, 1834, c. 76, § 4, 44 Stat. 687, establishing new land districts, directed the President to cause to be offered for sale "all the lands lying in said land districts." Thus there was presented the question whether or not the later act superseded the other, there being lands of both classes in those districts; and of this the court said:

"The rule is that a perpetual statute (which all statutes are unless limited to a particular time), until repealed by an act professing to repeal it, or by a clause or section of another act directly bearing in terms upon the particular matter of the first act, notwithstanding an implication to the contrary may be raised by a general law which embraces the subject-matter, is considered still to be the law in force as to the particulars of the subject-matter legislated upon. Thus, in this case, all lands within the district mean lands in which there are, and in which there are not, minerals or lead mines; but a power to sell all lands, given in a law subsequent to another law expressly reserving lead-mine lands from sale, cannot be said to be a power to sell the reserved lands when they are not named, or to repeal the reservation. In this case there are two acts before us, in no way connected, except in both being parts of the public land system. Both can be acted upon without any interference of the provisions of the last with those of the first; each performing its distinct functions within the sphere as Congress designed they should do."

United States v. Greathouse arose under the laws relating to the prosecution of claims against the United States. Section 1069 of the Revised Statutes [U. S. Comp. St. 1901, p. 740] provided that such claims should be barred unless the petition was filed within six years after the claim first accrued, but contained an excepting clause in favor of married women and others, including persons beyond the seas, who were permitted to sue within three years after the disability ceased. In 1887 Congress passed an act (Act March 3, 1887, c. 359, 24 Stat. 505 [U. S. Comp. S. 1901, p. 753]) relating to the prosecution of such

claims, which, in a proviso to its first section, declared that "no suit against the government of the United States shall be allowed under this act unless the same shall be brought within six years after the right accrued for which the claim is made," but contained no excepting clause in favor of married women or others. That act also declared all acts and parts of acts in conflict with it repealed. Greathouse was beyond the seas from 1886 to 1889, when his claim accrued, and until 1894, when his suit was commenced. In answer to the government's contention that the excepting clause in section 1069 was displaced by the later act the court held:

"The act of 1887 only superseded such previous legislation as was inconsistent with its provisions. It is true that, if that act be literally construed, there is some ground for holding that Congress intended by the proviso of section 1 to cover the whole subject of the limitation of suits against the government, in whatever court instituted. But we cannot suppose that it was intended to strike down the exceptions made in section 1069 of the Revised Statutes in favor of 'the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued.' Those exceptions were not expressly abrogated by the act of 1887, and they could be held to be repealed only by implication. But repeals by implication are not favored, and when two statutes cover in whole or in part the same matter, and are not absolutely irreconcilable, effect should be given, if possible, to both of them. *Frost v. Wenle*, 157 U. S. 46, 58, 15 Sup. Ct. 532, 39 L. Ed. 614; *United States v. Healey*, 160 U. S. 136, 147, 16 Sup. Ct. 247, 40 L. Ed. 369. In conformity with this principle we must adjudge that the above proviso of section 1069 of the Revised Statutes is still in force, because not absolutely inconsistent with the last proviso of the act of 1887; consequently, that the claim of a person who was beyond the seas at the time the claim accrued is not barred until three years shall have expired after such disability is removed without suit against the government. Although the act of 1887 prescribes the limitation for suits 'under this [that] act,' without making any exception in favor of persons under disability, it should be interpreted as if the proviso in section 1069 of the Revised Statutes were added to section 1 of that act. We could not hold otherwise without deciding, in effect, that the limitation of six years applied to claims accruing to married women and infants during their respective disabilities, as well as to the claims of idiots, lunatics, and insane persons. We are unwilling to hold that Congress intended any such result."

Can reasonable purpose and operation be accorded to the special saving clause without impinging upon the purpose and operation of the general statute? If so, it is quite plain that the broad language of the former does not necessarily relate to the particular subject of the latter, and, therefore does not by necessary implication manifest an intention to supersede or repeal it. When we consider that the special saving clause was part of the Hepburn bill from the time of its introduction in the House of Representatives, and that the provision amending section 1 of the Elkins act did not become part of the bill until after it had passed the House of Representatives and was pending in the Senate, it is difficult to believe that the former has particular reference to the effect of the partial repeal wrought by the latter. And, when we consider that any ground which could have been reasonably advanced for enforcing the repealed law against offenders who were then indicted would have been equally applicable to others who, within the period prescribed by the statute of limitations, had offended in like manner, but were as yet unindicted, and also the marked contrast between the

explicit and appropriate terms of the general statute, which was presumptively in the mind of Congress, and the altogether different terms of the special saving clause, it is difficult to believe that the latter has any reference to the particular subject of the former, namely, the effect of a repealing act upon the enforcement of penalties, forfeitures, and liabilities incurred under the law repealed.

We turn, therefore, to the other provisions of the Hepburn act, in the light of which the special saving clause must be read, to ascertain whether or not they indicate that it has another purpose and field of operation, more consonant with reason and with its different language. That act fills 12 pages of the Statutes at Large and comprises 11 sections. Its purpose is that of perfecting the existing law regulatory of interstate commerce, and this is done by eliminating or changing old provisions deemed unsatisfactory, and by adding supplementary or auxiliary provisions intended to give greater strength and efficiency to the law. These changes all fall within the general category of amendments, but they differ widely in subject and operation. Some operate to repeal portions of the prior law imposing penalties, forfeitures, or liabilities, and therefore come within the explicit terms of the general saving clause (Rev. St. § 13). Others have more immediate relation to proceedings in the courts of the United States; and still others have immediate relation to proceedings before the Interstate Commerce Commission. Within the first class is the partial repeal of section 1 of the Elkins act, resulting from the insertion of the word "knowingly"; within the second are several of the changes in section 16 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), notably those relating to the procedure in the Circuit Courts upon petitions for the enforcement of orders of the Interstate Commerce Commission and that removing the pecuniary limitation upon the right of appeal to the Supreme Court in such cases; and within the third are the change in section 14, some of the changes in section 15, and the change in the opening paragraph of section 16. If proper regard be had to the subject and operation of these varied changes, and also to the settled operation of the general saving clause, with which Congress was presumptively familiar, it is reasonably plain, as we think, that the special saving clause, although speaking of the amendments collectively, is directed against such of them only as, in its absence, would affect causes then pending in the courts of the United States, and is intended merely to secure the continued prosecution, in the manner theretofore provided, of such pending causes as otherwise would be affected. In the presence of the general saving clause, pending causes for the enforcement of penalties, forfeitures, or liabilities would not be affected by the repeal of portions of the prior law imposing them; nor would pending causes in the courts be affected by the changes having immediate relation to proceedings before the Interstate Commerce Commission. Thus far, therefore, there was no occasion for a special saving clause in favor of causes then pending in the courts of the United States. But the changes having immediate relation to proceedings in those courts altered the situation; for they, if not restrained, would affect both pending and future causes. 2 Sutherland, St. Con. (2d Ed.) § 674; *Railway Company v. Grant*, 98 U. S.

398, 25 L. Ed. 231; *Campbell v. Iron Mountain Silver Mining Co.*, 83 Fed. 643, 27 C. C. A. 646. Here, then, was occasion for a special saving clause, and the language of section 10 appears to have been well chosen to meet it. True, in the absence of the general saving clause, that language would be broad enough to also cover part of the ground covered by it—that is, to save such penalties, forfeitures, and liabilities as would be enforced by the continued prosecution of pending causes: but that is not a controlling guide to its meaning, in the presence of the general saving clause, for not only is the true intentment of language often dependent upon the circumstances in which it is used, but the state of the law when a statute is enacted is always an important factor in its interpretation. As before indicated, the special saving clause does not contain any term or expression which bears directly upon the effect of the repealing portions of the act upon existing penalties, forfeitures, and liabilities; nor does it contain anything which was not reasonably appropriate to the occasion, if Congress, mindful of the existence of the general saving clause and satisfied to leave it in undisturbed operation, was solicitous merely that the amendments bearing directly upon the jurisdiction and procedure of the courts of the United States should not affect causes then pending therein. In these circumstances we are persuaded that the special saving clause can be accorded reasonable purpose and operation by treating it as intended only to save such causes from what, in its absence and in the presence of the general saving clause, would be the effect of the amendments upon them; and we accordingly hold that, rightly interpreted, it does not cover any part of the particular subject of the general saving clause, and, therefore, does not by necessary implication manifest an intention to release or extinguish penalties, forfeitures, and liabilities for the enforcement of which no cause was then pending.

It follows that there was no error in the rulings of the District Court, and its judgment is affirmed.

(155 Fed. 964.)

MEMPHIS KEELEY INSTITUTE et al. v. LESLIE E. KEELEY CO.

(Circuit Court of Appeals, Sixth Circuit. July 20, 1907.)

No. 1,619.

1. TRADE-MARKS AND TRADE-NAMES—UNFAIR COMPETITION—RIGHT TO PROTECTION—MISREPRESENTATION BY PLAINTIFF—EVIDENCE.

Evidence considered, and *held* to establish the contention that the complainant, which was the manufacturer and proprietor of a secret remedy which it sold and used for the treatment and cure of the opium, liquor, and tobacco habits, and which it claimed and represented to the public as having as its chief and most valuable ingredient chloride of gold or "double chloride of gold," was chargeable with fraudulent misrepresentations, in that such remedy did not contain any gold or chloride of gold.

[Ed. Note.—Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

2. SAME—EFFECT—FRAUDULENT REPRESENTATIONS.

The proprietor of a medicine or remedy made in accordance with a secret formula, which knowingly makes false and fraudulent representations as to the ingredients of such remedy to the public through its advertisements and labels, cannot maintain a suit in equity to protect its

business of selling or administering such remedy from invasion and injury by another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 94.]

3. SAME—PLEADING.

That a complainant comes into a court of equity with unclean hands, in that he is chargeable with fraudulent misrepresentations to the public in respect to the subject-matter of the suit, is not, strictly speaking, a defense, and need not be pleaded, but, upon such fact appearing, it will be given effect by the court in the interest of the public by refusing to grant relief to the complainant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 103.]

Appeal from the Circuit Court of the United States for the Western District of Tennessee.

For former opinion, see 144 Fed. 628, 75 C. C. A. 430.

C. W. Metcalf, for appellants.

T. E. Barry, for appellee.

Before SEVERENS and RICHARDS. Circuit Judges, and COCHRAN, District Judge.

COCHRAN, District Judge. This is the second appeal of this case. The first appeal was dismissed, and the opinion then delivered is reported in 75 C. C. A. 430, 144 Fed. 628. A reading thereof will disclose the ground of the dismissal and the nature of the controversy involved in the case. In brief, the first appeal was dismissed because the decree appealed from was not final. It was a partial dismissal of the bill. It did not dismiss the bill entirely, but only one branch of the controversy raised by it, and that a subordinate one. On the return of the cause to the lower court, it disposed of the whole controversy by a final decree. It receded from the position taken on the former hearing that the contracts between the appellee and the appellant Memphis Keeley Institute had been abandoned and rescinded before suit brought, because of which said partial dismissal of the bill, to wit, in so far as it sought a cancellation of said contracts, was made, and granted appellee the full relief which it sought. It enjoined the appellants from claiming that they had a right to, and were, in fact, administering Keeley remedies at the Memphis Keeley Institute, and adjudged a cancellation of said contracts and delivery up to appellee of the Keeley remedies in possession of the appellants on their being reimbursed the price paid for same. It is from this decree that this appeal is taken.

The main ground upon which appellants claim that the decree of the lower court should be reversed is that the appellee did not come into that court with clean hands, and therefore was not entitled to the relief it sought and that was granted to it. The position that it did not so come into court is undertaken to be maintained in this way. The business in which the appellee is engaged, to wit, administering, and selling to be administered, what are known as "Keeley remedies" for the opium, liquor, and tobacco habits and neurasthenia, and which was sought to be, and by the decree is, protected from injury and invasion by appellants, has been built up and is being maintained by

certain fraudulent misrepresentations. This position was urged on the lower court, and it was claimed that because of it the bill should be dismissed. But it refused to so hold and, as stated, granted appellee full relief. This it did for two reasons: One was that the evidence did not establish the position that appellee's business had been built up and was being maintained by any such misrepresentations. The other was that, even if it did, that fact was not against appellee's right to relief. We will dispose of these two reasons in the order stated. The alleged fraudulent misrepresentations relied on are quite numerous. The main one is that gold is the principal ingredient and effective agent in said remedies. We will limit our consideration to this alleged fraudulent misrepresentation, because we are constrained to hold that the claim of appellants in regard thereto is made good by the evidence.

It is not disputed that appellee represents to the public that gold is the principal ingredient and effective agent in its remedies. So distinct, repeated, and emphatic has been and is its representation to this effect that it must be held that its business has been built up and is being maintained by this representation. The name which it has given its remedies, and by which they are known, is the "Double Chloride of Gold Cure." There is no such substance as the "Double Chloride of Gold." There is a chloride of gold and a chloride of sodium. The claim was that these two substances were ingredients of the remedies, and to voice the claim the short form, of "Double Chloride of Gold" was adopted. It was intended to designate that the remedies contained the two chlorides of gold and sodium. This name is printed upon the labels on the bottles containing the remedies, and is used in the circulars and other means used to advertise the business. The remedy for neurasthenia is called "Gold Neurotine." To emphasize the claim as to the existence of gold in the remedies and its importance, the prominent portion of the lettering on the labels on the bottles is in gold. They contain a picture of the globe with a belt around it encircled by the words, "We belt the world," and on the belt are these words, "Gold cure for opium habit, gold cure for drunkenness, gold cure for neurasthenia, gold cure for tobacco habit"—all in gold. The labels contain this statement, to wit:

"Gold is especially beneficial in its action on the mental forces. It gives the patient courage, hope, and renewed will power; and is the only medical agent that will effectually and forever relieve all craving or necessity for alcohol in any form. The remedy can in no way act injuriously on the patient."

And users are cautioned to break the bottle when empty to prevent its re-use for the sale of "spurious Gold Cure Mixtures."

In a circular or pamphlet issued by the appellee, under the name of Dr. Leslie E. Keeley, it is said:

"There is some criticism regarding my method of cure. The principal drug I use in the cure of drunkenness, the chloride of gold and sodium, or the double chloride of gold, is known throughout civilization."

Again:

"I come now to speak of my discovery of the Double Chloride of Gold in the treatment of the disease—the specific cure for drunkenness or alcoholism."

The pathology of the disease being understood, the indications for the gold remedies is a rational one, and not empirical. The action of gold as a medicine is primarily upon the higher cerebral nerve centers, the very seat of diseased will, and of the mania for strong drink."

Again:

"The Keeley treatment consists of remedies and solutions (with the Double Chloride of Gold as a basis)."

And again:

"Many remedies have been proposed and tried with some good results and many vexatious failures, but the most effective agent yet employed is gold."

In a pamphlet so issued entitled, "A Keeley Cure Catechism," amongst others, are the following questions and answers, to wit:

"Q. What is his remedy?

"A. With the Chloride of Gold and Sodium (the Double Chloride of Gold as a basis) he has compounded the best reconstructive nerve tonic in existence.

"Q. But does he not heal all alike?

"A. No, to quote his own words, 'the principal drug I use in the cure of drunkenness is the Double Chloride of Gold.'"

In a pamphlet so issued entitled, "Neurasthenia or Nerve Exhaustion; Its Treatment and Cure," is this statement:

"For the condition of the system, reason, as well as science, would indicate a remedy which will have a direct and positive effect upon the nerve centers. Such an agent is found in the Double Chloride of Gold. The remarkable therapeutical virtues of gold have long been known, but its scientific and accurate application has not been understood by the profession and hence its disuse. By the special method of preparation employed by Dr. Leslie E. Keeley, the Double Chloride of Gold has become the great ethical agent which, acting promptly upon the nerve centers, gives to the worn out and diseased system renewed health, activity, and life."

The sole question at issue in regard to this representation is as to whether it is a misrepresentation and fraudulent; i. e., intended to mislead and deceive the public. If it is untrue and known to be so, the rest follows.

The record contains positive evidence to the effect that it is untrue and known to be so. It contains no affirmative evidence that the representation is true. The appellee has contented itself with the position that the appellants have failed to make good that it is a fraudulent misrepresentation. And the case hangs here on the correctness of this position. That positive evidence consists of the testimony of a former partner of Dr. Leslie E. Keeley, and, according to his testimony, the originator jointly with Dr. Keeley of the remedies and the business, and of an analytical chemist, to whom certain bottles purporting to contain the remedies were submitted for analysis, pending this litigation. The witness first referred to is named Frederick B. Hargraves. Before his connection with Dr. Keeley, he had been a preacher in the Wesleyan Methodist Church in England, and afterwards in the Presbyterian Church, and then a lawyer. At the time when that connection began, he was state lecturer for the Illinois State Temperance League, and when he gave his testimony his occupation was that of a traveling salesman. In the spring of 1880, when both he and

Dr. Keeley were living in Dwight, Ill., each noticed independently of the other a suggestion in the same newspaper as to a remedy for the cure of drunkenness. In talking about a mutual friend who was addicted to drunkenness, this common knowledge became known to each. Subsequently Dr. Keeley told him that he had used the remedy and gotten good results from it. Hargraves doubted it, and the doctor said the matter could be easily demonstrated—that he would get Pat Conafry, a well known saloon keeper at Dwight, to take the remedy and test it, as Pat would take anything he asked him to take. The doctor fixed up a bottle, and gave it to Conafry, and in a few days he lost his desire for liquor, and could not drink any at the end of about a week. He made strong efforts to drink again, and one Sunday got a drink to stick and became gloriously drunk, and would not take any more medicine. The test, however, was sufficient for Hargraves, and that was the origin, as he terms it, of the “cure business.” At first Dr. Keeley refused to become known in the matter, but shortly afterwards the medicine was used with good result on one Major John P. Campbell, of Lexington, Ky., then residing at Dwight, and thereupon the three, Keeley, Hargraves, and Campbell, embarked in the business under the firm name of “Leslie E. Keeley, M. D.” Not long after this Campbell went out of the business, and on June 1, 1881, a partnership, with the same firm name, was formed between Keeley, Hargraves, and three others, to wit, John R. Oughton, a drug clerk, one Major C. J. Judd, and Father James Halpin, a Catholic priest, all living at Dwight; the interest of Keeley being three-tenths, and of Hargraves two-tenths, and the remaining five-tenths being divided amongst the other three. The partnership was evidenced by written articles. Dr. Keeley was the dominating spirit of the firm. He had general control of the business, the determination of the duties to be performed by the working partners, being all the others except Halpin, the fixing of their wages, and the power if any partner violated the terms of the agreement, or failed to perform his duties properly, or to conduct himself in a gentlemanly or becoming manner, to terminate his connection with the business. He, however, did not push himself to the front otherwise than in the firm name. He would say:

“I am the big spider in the back office. Always throw a little mystery around me; keep me in the background.”

Oughton prepared the remedies and Hargraves was the correspondent and literary man—the advertiser—or, as he styled himself, the general publicity man. He designed the bottles, got up the labels, and prepared the literature by which the remedies and business was advertised. He wrote the partnership agreement. He continued his connection with the business until March, 1886, when he was forced to sell out because of a severe criticism of Judd for something he had done.

This history of the business, and Hargraves’ connection therewith, is gathered from his testimony, and, so far as the nature of the last partnership is concerned, is confirmed by a copy of the articles filed as an exhibit. His testimony also covered the subject as to whether there was any gold in the remedies used in the business. He testified

that he knew the formula by which those remedies were prepared, and that they contained no gold whatever. As bearing on that subject are the following facts testified to by him: Whilst he, Keeley, and Campbell were running the business, they treated a sewing machine agent named Dalliba, at Bloomington, Ill., for the liquor habit, probably the third patient; the other two being Conafry and Campbell. For the first time they administered to him chloride of gold and sodium in form of pills, except once when it was administered in powdered shape. They did not know especially what effect gold would have, and they used it as an experiment. The remedy they had was a tonic remedy, and was only a sobering up process. They had to have something better than that as a specific for the liquor habit. The gold remedy came near killing the patient, and they had to stop it. It was never used afterwards. They hit on a remedy that did all that they expected the gold to do, and was a far more valuable specific for drunkenness than gold, and they used it in its place. Keeley often said to Hargraves, "What a lucky thing we happened to hit upon that drug," as it saved further experiment, and was not dangerous. The remedy, however, has always been called the "Double Chloride of Gold Cure," as they had intended to use gold at the start.

It seems that the medical profession regard gold in certain forms to be beneficial to mental forces, and it is sometimes prescribed for that purpose. It was not used to any extent as a medicine at that time, but has been used more since. They regarded it as an awfully good name, and Keeley hated to part with it. He claimed that it was an effective name to use—impressive. They reconciled themselves to its use on the idea that there is gold in everything—gold in mud—a trace of gold. Keeley would say: "There is a trace of gold any way in it, and that is enough." They kept up the fiction as to gold by having three or four drams of chloride of gold and sodium in the safe, and showing them to visitors coming to look over the laboratory as samples of the gold and sodium used in the remedies. They were constantly assailed by persons claiming that there was no gold in the remedies. To meet this criticism, one S. T. K. Prime, living near Dwight, who claimed that people generally did not believe there was any gold in them, at their instance came to their laboratory and picked two bottles from the stock prepared for shipment and carried them to Prof. Marriner, a celebrated analytical chemist at Chicago, for analysis. Before Prime did this, Oughton fixed up two bottles with gold in them, and put them in a row that was half full of bottles. They were the last two bottles in the row, and naturally Prime selected those two bottles, as they were the nearest to him and came first to his hand. Of course, Prof. Marriner found gold in the mixture submitted to him, and they obtained a certificate from Prime as to his having selected the bottles from those in the laboratory prepared for shipment, and one from Marriner as to the result of his analysis, and circulated them in the course of the business.

The analytical chemist, whose testimony was introduced in support of the position as to the lack of gold in the Keeley remedies, is Dr. William Krauss, a resident of Memphis, Tenn., where appellants reside and carry on business. He is a physician also, a graduate of

the Baltimore College of Pharmacy, has taught chemistry at the Memphis Medical College, and has been the official chemist of the Tennessee Pharmaceutical Association. He testified that he analyzed the mixtures in some five or six bottles, purporting to contain Keeley remedies brought to him by the appellant C. B. James, president of the appellant Memphis Keeley Institute and the active litigant on appellants' side in this litigation, a portion of them shortly after the bringing of the suit, which was November 1902, and the rest about a year later, and that none of them contained any gold. He gave in detail the analysis that he made so that it is capable of being determined whether it was properly made. The bottles, when brought to him, were sealed and labeled. They were intact, and bore no evidence of having been tampered with. He described the bottles and their labels, and they correspond to the description of those containing the regular Keeley remedies. The bottles, with their remaining contents, were filed as exhibits in the cause. In the course of his testimony he was asked and answered as follows, to wit:

"Q. Then, doctor, you know there is no gold in the Keeley remedies by reason of the tests which you made?

"A. I am absolutely certain as to that. Absolutely certain that there is no gold in the Keeley remedies."

As bearing on the genuineness of said bottles so placed in Dr. Krauss' hands for analysis, Dr. Samuel Morrow, physician in charge at the institute of appellants, formerly a physician on appellee's staff at Dwight, and in the employ of various Keeley Institutes throughout the country, testified that on September 30 and October 16, 1901, shortly after appellee gave notice to appellants that it would not furnish any more Keeley remedies, except for patients in line, it made shipments thereof to the appellant Memphis Keeley Institute, invoices of which were exhibited, that the appellant C. B. James reserved out of these shipments a package of each kind of remedy for analysis, and locked them in a desk, properly sealed and labeled as they arrived there, and that he afterwards saw him remove these bottles from the desk and heard him say that he was going to take them to Dr. Krauss for analysis. The appellant C. B. James did not testify in the case at all, and hence gave no testimony touching the genuineness of the bottles which he furnished Dr. Krauss for analysis.

Such, then, is the positive and direct evidence in the record tending to show that appellee's remedies contain no gold. The evidence of neither of those witnesses is contradicted in any particular, nor has any affirmative evidence been introduced tending to show that said remedies do contain gold. As stated, appellee's position here is simply that this positive and direct testimony comes short of establishing that said remedies do not contain gold.

It undertakes to meet Dr. Krauss' testimony by the claim that there is no evidence that the remedies which he analyzed were genuine Keeley remedies. This evidence is lacking, it is urged, because the appellant C. B. James did not take the stand and testify that the bottles which he furnished Dr. Krauss were genuine Keeley remedies; i. e., part of the remedies which his institute had received from the appellee. This is to be accounted for only on the ground that said appel-

lant did not want to commit perjury or admit that they were not genuine. According to appellee, said appellant was bad and mean enough to commit perjury, but did not have courage to do so. But can it be truly said that evidence is lacking that said remedies so analyzed were genuine? We think not. Dr. Krauss testified that he got the bottles from said appellant, and that they were sealed, intact, and bore no evidence of having been tampered with.

Dr. Morrow testified that said appellant took out of a shipment of remedies by appellee certain bottles for analysis, locked them in a desk properly sealed and labeled as they had arrived and afterwards took them therefrom, saying that he was going to deliver them to Dr. Krauss for analysis. It is true that between the time of putting the bottles in the desk and taking them out again, or after taking them out, appellant may have substituted spurious remedies. But there is no evidence that he did, and, in the absence of such evidence, the presumption of fair dealing must be permitted to negative the idea that there was any substitution. The mere fact that said appellant did not testify that there had been no substitution cannot be twisted into evidence that there had been substitution. It is a weakening circumstance, but it can be given no such effect as this. That appellants had genuine Keeley remedies which they might have turned over to Dr. Krauss for analysis is charged in the bill, and part of the relief sought therein was a delivery of them up to appellee on reimbursement being made of the price paid for them.

Then, as to Hargraves' testimony, the only way in which it is met is by the claim that it is unreasonable to believe that he knew the formula by which the Keeley remedies were made. The basis of this claim as to unreasonableness is that Hargraves was neither a physician nor a chemist; that he was the speechmaker and literary man of the concern, and no part of his duties related to compounding remedies; that, if the secret of the formula was known to each of the partners, there would be nothing to prevent either from going into the business on his own account upon the dissolution of the copartnership, and compounding the remedy and treating patients under the Keeley remedies; and that Dr. Keeley was the important man and controlling and dominant factor in the concern. We fail to see anything in any of these circumstances to render Hargraves' knowledge of the formula so unreasonable as to require one to hold his sworn statement that he did know the formula to be untrue. The partnership agreement itself would seem to indicate that he knew it, for it is expressly provided therein that:

"Each member of the firm shall jealously guard all information pertaining to the compounding of said remedies and their constituent parts and elements, and shall under no consideration divulge any information whatever concerning their manufacture to any one whatever."

But Hargraves' testimony is not confined to telling what the formula contained. It tells of tricks resorted to in order to make the public believe that the remedies contained gold, when, in fact, they did not. In the trick played upon Prime and Prof. Marriner, Oughton, president of the appellee since February 21, 1900, when Dr. Keeley died, was the prominent figure. He testified as a witness in the case, yet

he was not asked about nor did he testify in regard to this matter. If such tricks were resorted to, they can be accounted for on no other basis than that the remedies did not contain gold. If they had contained gold, they would not have been resorted to. Criticism of Hargraves' testimony, at various points, has been indulged in. We cannot enlarge this opinion to take them up in detail. We have considered them carefully, and find nothing in them to lead us to discredit his testimony. The most that can be said against his testimony is that he was probably a willing, and, possibly, a revengeful witness.

But this is not all the evidence in support of the position that the Keeley remedies contain no gold. There is a circumstance which, if a consideration of the testimony of Hargraves and Krauss left one in a state of doubt on the subject, is sufficient to drive one to the conclusion that this position is correct. Said Oughton, appellee's president, who has done all the chemical work in preparing the remedies in question, and who knows the formula, was put on the stand by appellants. He was asked in regard to the Keeley treatment as to whether it contained gold, and he refused to answer. An extract from his testimony is in these words:

"Q. 164. Is there any gold in this treatment?

"A. I refuse to answer.

"Q. 165. We insist that you do answer.

"A. I still refuse.

"Q. 166. We notify you then that at the hearing we shall insist that there is no gold in the treatment. Do you still refuse to answer?

"A. I still refuse."

It is hard to account for this refusal upon any other basis than that the remedies do not contain gold. It cannot be accounted for on the ground that the formula is a secret, and it was not to be expected that the secret would be disclosed. But, if there is gold in the remedies, in so far the formula is not a secret. For over a quarter of a century appellee has claimed to the public, and emphasized its claim, that its remedies contain gold. An answer to this question would not open up the rest of the formula or the extent of the gold it contained, for so far the formula was a secret. But as to whether there was any gold at all there was no secret as to that if there was gold there. The silence of appellee's president when asked this question must therefore be construed against it.

This brings us to the other reason, why the lower court refused to give any effect to the position that appellee's business had been built up and was being maintained by fraudulent misrepresentations. It was that, even if this was true, it was not against appellee's right to relief. But, before considering just how this was attempted to be made out, it is to be noted that this court has heretofore held that a court of equity should not protect against injury or invasion a business of selling a medicine which has been built up and is being maintained by fraudulent misrepresentations as to its ingredients, and this on the ground that a suitor in equity should come into court with clean hands. This it did in the case of *Fig Syrup Co. v. Stearns*, 73 Fed. 812, 20 C. C. A. 22, 33 L. R. A. 56. That was a suit by a manufacturer of a liquid laxative medicine, to which he gave the name

"Syrup of Figs" or "Fig Syrup," to enjoin another from interfering with his business by unfair competition. It was held that it was not entitled to the injunction because it falsely and fraudulently represented to the public that the juice of the fig was the important medicinal agent in the composition of the medicine, when, in fact, just a suspicion of fig juice was put into it not for the purpose of affecting its medicinal character or even its flavor, but merely to give a weak support to the statement that the article sold was syrup of figs, and the laxative agent in it was senna. This was so held notwithstanding there was much evidence introduced showing that it was a very useful medicine and prescribed by physicians of high standing. Judge Taft said:

"This is a fraud upon the public. It is true, it may be a harmless humbug to palm off upon the public as syrup of figs what is syrup of senna, but it is nevertheless of such a character that a court of equity will not encourage it by extending any relief to the person who seeks to protect a business which has grown out of and is dependent upon such deceit."

The case was subsequently approved and followed by the Supreme Court in the case of *Worden v. California Fig Syrup Co.*, 187 U. S. 519, 23 Sup. Ct. 161, 47 L. Ed. 282.

The case we have here comes clearly within the holding in these two cases. The ground upon which the lower court held that the fact that appellee's business may have been built up and grown out of fraudulent misrepresentations to the public was not in the way of its right to the relief it sought was substantially this: A dismissal of the bill for that reason would aid the appellants in practicing the very same fraud upon the public that it is claimed that appellee is practicing, and would therefore put the court in an inconsistent position. The way in which it was thought that such a dismissal would have this effect was that it would amount to an adjudication that the appellant Memphis Keeley Institute had a valid subsisting contract with appellee, and thereby enable it to obtain remedies from appellee to administer to patients. But such a dismissal could not possibly have any such effect. It would not be an adjudication as to the rights of the parties as between themselves. It would be a direct refusal to make any such adjudication. And a court of equity will not aid a plaintiff who comes before it with unclean hands, even though by not doing so it deprives itself of the opportunity to prevent the defendant from doing the unclean thing, and thus may be said to indirectly aid the defendant in so doing. In the Fig Syrup Case the defendant was taking plaintiff's business by unfair competition, and was practicing the very same fraud on the public, because of which the court refused to aid plaintiff, yet the court did not stop him from so doing by granting plaintiff injunctive relief, but turned the plaintiff out of court.

Counsel for appellee cites and relies on a number of cases which hold that a court of equity will not turn out of court an unclean man, or a man who has done an unclean thing which has no relation to the thing which it is sought to have protected by its decree. But such decisions have no application here. The uncleanness here has to do with the very thing which the court is asked to protect and prevent from injury and invasion by appellants. The appellee claims to have

the right to administer and to sell for administration, in the state of Tennessee, its Keeley remedies, and that appellants are injuring that right and invading its business by asserting that it has the right to and is in fact administering such remedies at the Memphis Institute, and asks the court to protect its right and business from such injury and invasion by enjoining appellants from so claiming, canceling the contracts, and requiring a delivery up of the remedies held by appellant. But that business—the very thing which the court is asked to protect—is, as we have held, unclean in the particular stated. Hence it is a clear case within the rule that a court of equity will not aid one who comes before it with unclean hands.

It should be noted, however, though it is not relied on either by the lower court or by appellee's counsel here, that the fact in regard to appellee's fraudulent misrepresentations, as we have adjudged it, was not set up by appellants in their answer as a defense to the suit. This presents the question whether, in the absence of its having been so presented, any effect can be given to it. It seems to be well settled that such a matter need not be pleaded as a defense to the suit. If it appears from the record, it will be given effect notwithstanding it has not been pleaded. The theory upon which this is done is that in reality it is not a matter of defense. It is given effect to, not on defendant's account, but because of the public. As said by the Supreme Court of Tennessee in the case of *Simmons Med. Co. v. Drug Co.*, 93 Tenn. 99, 23 S. W. 169:

"It is not strictly speaking a defense at all, but rather an interposition by the court to discourage fraud and wrong upon the public."

The following decisions lend support to and uphold this doctrine: *Fetridge v. Wells*, 13 How. Prac. (N. Y.) 385; *Cardoze v. Swift*, 113 Mass. 250; *Dunham v. Presby*, 120 Mass. 285; *Connell v. Reed*, 128 Mass. 477, 35 Am. Rep. 397; *Teoli v. Nordrill*, 23 R. I. 87, 49 Atl. 489; *Mass. Nat. Bank v. Shine*, 163 N. Y. 360, 57 N. E. 611.

In view of the holding that we have made as to this matter, it is not necessary that we consider any other question raised and discussed on the appeal.

We feel constrained, therefore, to adjudge that the decree of the lower court be reversed, and the cause remanded thereto, with directions to dismiss the bill.

(156 Fed. 97.)

UNITED STATES v. CHARLES H. WYMAN & CO.

(Circuit Court of Appeals, Eighth Circuit. July 22, 1907.)

Nos. 1,798, 2,580.

1. CUSTOMS DUTIES—PROTEST—PERIOD FOR FILING.

Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933], permitting protests against decisions of collectors of customs to be filed "within ten days after but not before" liquidation of the entries, fixes definitely the time within which a protest must be filed; and, if not filed within this period, a protest is invalid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs Duties, § 198.]

2. SAME—EXTENSION OF TIME—CUSTOMHOUSE ERROR.

By a customhouse error the date of liquidation was stated in an entry as being later than it was in fact, and a representative of the importer was thereby misled; but the correct date was given in both a notice sent to the importer and the liquidation bulletin posted for inspection by importers. *Held*, that the error did not have the effect of extending the period for filing protests, prescribed by Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933].

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs Duties, § 198.]

3. SAME—LIQUIDATION—DISCREPANCY IN DATE.

For the purpose of ascertaining the date for filing protests, importers are bound to take notice of the dates given in the liquidation bulletin publicly posted as prescribed by the customs regulations; and, in case of conflict between the bulletin and notations on the entry, they should be governed by the former.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs Duties, § 198.]

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Edward P. Johnson, Asst. U. S. Atty. (Henry W. Blodgett, U. S. Atty., on the brief), for the United States.

Clinton Rowell and Joseph H. Zumbalen, for importers.

Before VAN DEVANTER and ADAMS, Circuit Judges, and RINER, District Judge.

RINER, District Judge. This is an appeal from an order of the Circuit Court for the Eastern district of Missouri, reversing the action of the Board of United States General Appraisers in overruling the protest of Charles H. Wyman & Co., a corporation, importer, and further ordering that the surveyor of customs at the port of St. Louis reliquidate the entry in controversy according to certain findings made by the court.

It appears from the record that Wyman & Co. imported on the steamer Wilhelm der Grosse from Bremen two cases, numbered 521 and 525, containing millinery, buckles, and ornaments valued at \$135. The importation was entered on the 3d day of July, 1900, at the port of St. Louis as No. 17. The duty thereon was fixed at 60 per cent. ad valorem, under paragraph 434 of the tariff act of 1897. Act July 24, 1897, 30 Stat. 151, c. 11 [U. S. Comp. St. 1901, p. 1676]. The en-

try was liquidated July 6, 1900. The liquidating clerk, by mistake, made the date of liquidation July 7, instead of July 6, 1900, the figure "7" being in red ink. He then passed the entry back to the entry clerk, who discovered the error in the date and corrected it by drawing a line through the figure "7" and writing over it in black ink the figure "6." It was admitted by the importer that the change was not made with the intent to injure or benefit any one. The record of the liquidation of this entry, No. 17, in the entry clerk's office, shows that it was liquidated July 6, 1900. The evidence shows that the entry was placed upon the bulletin of liquidations, which is posted for the inspection of importers; and it is stipulated between the parties that the bulletin sheet of July 6, 1900, shows this entry to have been posted as liquidated July 6, 1900. The importer also received notice dated July 6, 1900, from the entry clerk, advising it of the liquidation of this entry; and the memorandum on the back of this notice setting forth the data from which to prepare a protest was admitted to be in the handwriting of Mr. Hollman, acting for and on behalf of the importer. The protest was presented to the surveyor of customs on the 17th of July, 1900, who declined to receive it on the ground that it was not presented in time. It was then presented to the Board of United States General Appraisers, who, after hearing, on the 17th of October, 1905, sustained the decision of the surveyor. An application was then made, within the time allowed by law, to the Circuit Court for the Eastern district of Missouri, for a review of the questions of law and fact involved in the decision; and upon consideration of the evidence taken by the Board of General Appraisers, together with some additional evidence taken pursuant to an order of court, the Circuit Court entered the order here complained of.

Two questions are presented by this record: First, was the protest presented in time; and, second, if so, was the merchandise properly assessed at 60 per cent. ad valorem, as jewelry, under paragraph 434 of the act of 1897?

Section 14 of an act of Congress (Act June 10, 1890, 26 Stat. 137, c. 407 [U. S. Comp. St. 1901, p. 1933]), entitled "An act to simplify the laws in relation to the collection of revenue," approved June 10, 1890), so far as it becomes necessary for the determination of the question first suggested, is as follows:

"That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive against all persons interested therein unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties, shall, within ten days after 'but not before' such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within ten days after the payment of such fees, charges, and exactions, if dissatisfied with such decision give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon."

We think the provision of the statute above quoted fixes definitely the time within which the protest must be filed, and that the 10 days

begins to run from the date of final liquidation. Prior to this act of 1890, a protest could be filed at any time after entry and duties estimated thereon; the final liquidation being regarded only as fixing the limit beyond which notice could not be given. *Davies v. Miller*, 130 U. S. 284, 9 Sup. Ct. 560, 32 L. Ed. 932. The case of *Davies v. Miller* was decided in 1889, and the statute in force at that time provided that the decision of the collector should be final unless the owner, importer, agent, or consignee of the merchandise—"shall within ten days after the ascertainment and liquidation of duties * * * give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein distinctly and specifically the grounds of his objection thereto." This provision, as already suggested, the Supreme Court held, only fixed the limit beyond which notice could not be given; and it was doubtless for the very purpose of avoiding the inconvenience arising from this practice that in the act of 1890 the words "but not before" were inserted in section 14, thus confining the time of the protest to within 10 days from final liquidation and to prevent it from being filed either before the final ascertainment or after the expiration of the 10 days from such final ascertainment. In *re Guggenheim Smelting Company*, 112 Fed. 517, 50 C. C. A. 374; In *re Bailey et al.*, 112 Fed. (C. C.) 413.

It is admitted that this entry, No. 17, was as a matter of fact liquidated on the 6th of July, 1900, but it is insisted that, because the liquidating clerk by inadvertence indorsed upon the entry in red ink the words "liquidated July 7th, 1900," the time for filing the protest began to run from that date. While it is true that Mr. Hollman, representing the appellee, stated in his affidavit that he obtained possession of entry No. 17 in order to get the details of the assessment for the purpose of filing protest if necessary, and that he did not observe any date other than the date of July 7, 1900, as indicating the date of liquidation; yet in our judgment the fact, if it was a fact, that the correction of the date on the entry had not been made until after Mr. Hollman's examination, which he states in his affidavit was made July 7, 1900, would not have the effect to extend the time, for the importer was not bound to take notice of the notations made by the liquidating clerk on the entry, but was bound to take notice of the liquidation bulletin sheet posted for inspection by importers and the notice sent to the importer by the entry clerk. Article 1417 and article 1460, Customs Regulations 1899. It is admitted that both the notice sent to the importer and the liquidation bulletin sheet in relation to this entry were dated July 6, 1900, and that the liquidation bulletin sheet shows the entry in question to have been posted as liquidated on July 6, 1900. We think, too, that the record clearly shows that the correction of the date on the entry itself was made on July 6, 1900, the date of liquidation, and the fact that Mr. Hollman did not see it was due to some oversight on his part. Mr. Johnson, the entry clerk, testified that entries were recorded the day they were received in a record book called "Record of Liquidations," and that this entry, No. 17, appeared upon that book as liquidated July 6, 1900, and that no change or correction in relation to this entry was made upon the record. Hence the correction of the date upon the entry, it is reasonable to presume, was

made before the entry was recorded. It follows from what has been said that the decision of the Board of General Appraisers was right, and should have been affirmed.

The conclusion reached upon the first question presented by the record renders it unnecessary to consider the second question.

The order of the Circuit Court is reversed, with directions to affirm the decision of the Board of United States General Appraisers.

(156 Fed. 100.)

STAIR v. KANE.

(Circuit Court of Appeals, Sixth Circuit. October 17, 1907.)

No. 1,656.

1. NEGLIGENCE—ACTION FOR NEGLIGENCE—QUESTION FOR JURY.

The petition, in an action against the lessee of a theater for a personal injury, alleged that among the appliances of the theater of which defendant had control was a fire extinguisher, which was kept on the sill of an open window at the side of the stairway leading to the gallery of the theater, that it was unsecured, and was in a place where men and boys in crowding down the stairway, as was usual at the close of a performance, were likely to knock it out of the window, as they in fact did, and that it fell and injured plaintiff, who was on the walk below. There was evidence tending to support such allegations. *Held*, that the petition and evidence made a case of negligence which was properly submitted to the jury.

2. SAME—EVIDENCE TO ESTABLISH.

The accident itself in such case may be regarded, in the absence of explanation, as proof of the negligence charged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 218, 271.]

3. EVIDENCE—RELEVANCY—SIMILAR TRANSACTIONS.

In such action, evidence was admissible to show that the descending crowd had several times previously dislodged the fire extinguisher from its place in the window, and that such fact was known to defendant, as material in determining whether or not the fire extinguisher was in an unsafe and dangerous place, and whether defendant was negligent in placing and permitting it to remain there on the occasion in issue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 406-413.]

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

Wm. B. Beebe and A. W. Lamson, for plaintiff in error.

R. B. Newcomb, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit brought by a minor, through his mother, for personal injuries against the lessee of the Cleveland Theater, in Cleveland, Ohio. The young man, Kane, had attended a night performance, and as he was leaving the theater he was struck on the sidewalk in front by a fire extinguisher, which, during the performance, and for some time before, had been standing in the window on the third or gallery floor, next the stairs down which

the occupants of the gallery passed to reach the street. The case went to the jury, and there was a verdict for the plaintiff.

It was the contention of the plaintiff that the defendant owned and controlled the fire extinguisher, that he negligently and carelessly placed it in the window unfastened and unsecured, and as a result it fell from the building and injured the plaintiff. In other words, the contention was that the fire extinguisher was unfastened and unsecured, and occupied a dangerous position, and that, although no one saw it fall, the jury had a right, under the circumstances, to infer that it fell because of the negligence of the defendant in permitting it to remain where it was, when he might reasonably anticipate that the crowding and jostling of the young men and boys, just out from an entertainment and eager to reach the street, would, in their hurry, push it from the window onto the fire escape and permit it to fall down upon the people leaving the theater below.

There are really but two questions presented: First, whether the petition stated a case of negligence which was supported by sufficient evidence to sustain the verdict; and, second, whether the court did right in permitting the introduction of evidence tending to show that the fire extinguisher was so placed in the window, unfastened and unsecured, and next the stairs which descended from the gallery towards the street, that on several occasions it was struck by the jostling crowd and fell over in the direction of the fire escape, being caught and held by an employé then on duty. There are some other questions relating to charges given or refused, but they all really depend upon the disposition of those that we have indicated.

1. As to the petition and the evidence in its support, we entertain no doubt that a case of negligence was stated by the plaintiff, and that the evidence was sufficient to warrant the court in leaving to the jury the determination whether the defendant was or was not guilty as charged. The petition states that the defendant had charge and control of the fire extinguisher which fell and injured the plaintiff; that the defendant negligently placed it in a window next the stairs which descended from the gallery, not safely or properly fastened or secured, and as a result it fell from the window over the fire escape and down on to the street, where it struck and injured the plaintiff, who was just leaving the theater. We think this states a case in favor of the young man against the lessee of the theater. The latter was compelled by law to provide a fire extinguisher, but it was his duty to put it in a secure place, where it would not be liable to fall out the theater and injure a patron or passer-by. This obligation accompanied the duty. The petition charges the violation of the obligation to place the fire extinguisher in a secure place. He was negligent in placing it where the ordinary movement of a gallery crowd (of which he was advised) might jostle it loose and let it fall on to the sidewalk. The accident itself might be regarded, in the absence of explanation, as proof of the negligence charged. *Scott v. London Dock Co.*, 3 H. & C., 596; *Cinti., etc., Ry. Co. v. South Fork Coal Co.*, 139 Fed. 528, 71 C. C. A. 316, 1 L. R. A. (N. S.) 533; *Traction Co. v. Holzenkamp*, 74 Ohio St., 379, 78 N. E. 529.

2. The ruling on the introduction of certain evidence arose during the testimony of Gross and Grussey, employés of the defendant not a great while before the accident. Gross was a special police officer and watchman in charge of the gallery from October 1, 1904, until February, 1905. He noticed the fire extinguisher standing in the window next the stairway where the crowd descended from the gallery. Asked to state what he noticed, if anything, with reference to the fire extinguisher when the crowd would be going down stairs, he said, after objection:

"The crowd would rush for the stairs. They would jam up against the window, and, when the window was open, there was twice that the fire extinguisher fell out, and I grabbed it."

At another place, Gross, in answering as to how the crowd came to knock the fire extinguisher out of the window, said:

"It started to fall, and I grabbed it as it went out, because the crowd came rushing like a lot of cattle. The small boys especially would fall into the sill of the window as they went down those stairs."

Grussey was ticket taker in the gallery and night watchman until August, 1905. Answering the question: "I wish you would state what you noticed when the crowd was rushing out with reference to the fire extinguisher in the window," Grussey said: "I have noticed the crowd bumped up against it and throwed it down several times." Grussey testified that he reported the knocking of the fire extinguisher out of the window to the manager of the theater, and wanted to put up some slats there to keep the crowd from brushing up against the window. Cookson, the manager, said this could not be done; no slats could be put up there.

As stated, the testimony of Gross and Grussey was admitted subject to exception, and its use was carefully limited in the charge; the court saying:

"I am requested, gentlemen, to charge that it is only the negligence of the defendant on the night in question which is to be considered by you as determining its liability in this case, and not its negligence at some other time. Evidence of what had occurred with respect to this fire extinguisher prior to the night when the accident occurred was only admitted in evidence for the purpose of showing that the fire extinguisher would fall over, and that the defendant was notified of the fact that it would so fall over or out as claimed by the plaintiff. Only for that purpose are you to consider the testimony of anything that happened in respect to the falling over of the fire extinguisher prior to that night."

In other words, the evidence was not used to show negligence on the part of the lessee on former occasions, but tended to show the usual conduct of the crowd in descending or "piling down" from the gallery; and, in view of such anticipated conduct, the fire extinguisher, in being placed unfastened in the window next to the descending crowd, was being left in an unsecure, dangerous, and negligent position. The fact that the descending crowd had several times dislodged it from its place in the window, and this was known to the lessee, was material in determining whether the fire extinguisher was or was not in an unsafe and dangerous place, and the lessee negligent in placing and leaving it there. We think the testimony was properly admitted, and we find no error in the action of the court below which would warrant a reversal.

The judgment is affirmed.

(156 Fed. 225.)

LYDIA COTTON MILLS v. PRAIRIE COTTON CO.

(Circuit Court of Appeals, Fourth Circuit. September 11, 1907.)

No. 685.

1. CONTRACTS—CONSTRUCTION—QUESTIONS FOR COURT AND JURY.

As a general proposition, where the issue is one of fact as to the performance of a contract, it is the province of the jury to pass upon it; but, before the question of compliance or noncompliance arises, there must be a determination of the terms of the contract itself, and where it is in writing showing the whole of the agreement, and its terms are capable of intelligent interpretation, its construction is for the court, and not for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 767.]

2. SALES—CONSTRUCTION OF CONTRACT.

In accepting an offer made by plaintiff to furnish a quantity of cotton, defendant wrote as follows: "We understand this cotton is to be full 1½ inch staple, same as the staple in the 25 bale sample lot you shipped to us, the grade to be average strict middling, nothing middling. We desire that you be particular in the selection of this cotton as nothing less than full 1½ inch, same type as the sample lot will be suitable to us." *Held*, that the contract so made required the cotton sold to be of the same grade as the sample lot of 25 bales, and that, where plaintiff admitted that the cotton shipped thereunder was not of such grade, it could not recover for breach of the contract by defendant in refusing to accept the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 188.]

3. WRIT OF ERROR—GROUNDS OF REVIEW—PRESERVATION—MOTION FOR DISMISSAL.

A defendant may assign for error the overruling of a motion to dismiss, made at the close of plaintiff's evidence, on the ground that there was no issue of fact for submission to the jury, although such motion was not renewed at the conclusion of all the evidence, where the only question in issue under the evidence was the proper construction of a written contract plain in its terms, upon which defendant's evidence had, and could have, no bearing.

McDowell, District Judge, dissenting.

In Error to the Circuit Court of the United States for the District of South Carolina, at Greenville.

W. R. Richey and Wm. G. Sirrine, for plaintiff in error.

Howard B. Carlisle (Carlisle & Carlisle, on the brief), for defendant in error.

Before PRITCHARD, Circuit Judge, and BOYD and McDOWELL, District Judges.

BOYD, District Judge. The Prairie Cotton Company, the plaintiff below in this case, which will be denominated plaintiff hereafter, is a Mississippi corporation, doing business in that state as a dealer in raw cotton. The Lydia Cotton Mills, the defendant below, which will hereafter be referred to as the defendant, is a South Carolina corporation, located in that state, carrying on the business of a manufacturer of cotton. The present suit was brought by the Prairie Cotton Company to recover the sum of \$2,500, alleged to be due the plaintiff on a

contract for the sale and delivery of cotton to defendant. The allegations of plaintiff are, in substance: That on the 11th of October, 1904, the defendant contracted to purchase from plaintiff 200 bales of cotton at the price of $10\frac{1}{2}$ cents per pound, the staple to be $1\frac{1}{8}$ " long, according to the custom of the cotton trade and of strict middling, nothing below middling; that 50 bales of this cotton were shipped to the defendant and were received and accepted; and that 150 bales were shortly thereafter shipped, which were refused. Thereupon the plaintiff, upon the refusal of the defendant to accept the last shipment of 150 bales, sold the same, and the basis of claim in the suit is the alleged loss by reason of the difference in the price received at the sale and the price agreed upon, together with the costs incident to the sale, et cetera, making in all the sum of \$2,500.

The defendant answers and says: That on the 13th of October, 1904, it agreed to take from the plaintiff 200 bales of cotton at the price of $10\frac{1}{2}$ cents per pound, but that the cotton contracted for was to be of the same quality and character as the 25 bales which had been theretofore purchased by the defendant from plaintiff as a sample lot; that the cotton was to be full $1\frac{1}{8}$ " in length of staple and was to average strict middling, nothing middling; that the 50 bales of the first shipment were sent with bill of lading attached; that defendant, without opportunity to examine the cotton, paid for it and received it from the railroad by which it had been shipped, but, after receiving it, upon examination, it was found that the cotton was of an inferior grade and was not the kind and quality of cotton, especially in length of staple, as the sample which had been furnished by the plaintiff and as had been contracted for by the defendant; that, when the last shipment of 150 bales arrived, defendant declined to accept that, it being of the same length of staple, quality, and grade as the 50 bales theretofore received, and not such cotton as had been contracted for.

The cause was tried by jury and a verdict rendered in favor of the plaintiff for \$2,255.66. The court, however, under a practice which prevails in South Carolina, reduced the verdict to \$1,127.83, and for the latter amount a judgment was rendered, to which the defendant's counsel duly excepted. At the close of the plaintiff's testimony the defendant's counsel moved the court to nonsuit the plaintiff on the ground that upon the undisputed evidence the plaintiff was not entitled to recover, and especially upon the exhibition of the communications, by letter and telegraph, between the parties, which were the evidences of the contract of purchase, together with the admissions of plaintiff through its agent, examined as a witness. The court refused to grant the motion, to which the defendant duly excepted. There were several exceptions taken by defendant during the trial; one particularly relied upon relating to the question as to whether or not there was a rescission of the contract by the plaintiff. But we do not deem it necessary to consider this nor any other question involved in the case, except that of a proper construction of the contract of purchase. In order to arrive at a full understanding of the contract, we deem it necessary to give the correspondence between the plaintiff and the defendant in relation thereto in full. The transaction was in 1904, and

on the 13th of August of that year the defendant addressed the plaintiff as follows:

"Aug. 13th.

"We will purchase a contract of cotton $1\frac{1}{8}$ inch staple running from Sept. 1, 1904, to Sept. 1, 1905, the cotton to be paid for as delivered and to be delivered 150 bales per month f. o. b. our mills. This cotton has to average full $1\frac{1}{8}$ inch staple, bender, nothing less than full will be accepted. If you are interested in such a contract we will be pleased to have your quotations and views from time to time until the contract is closed."

Plaintiff to defendant:

"Aug. 18th.

"Yours 13th to hand. Contents noted. We feel satisfied we can supply your wants as to the character of cotton wanted if we can agree on price. Such cotton as you mention will always command a pretty good premium over short cotton, say 1 to 1-16 staple. Will however, keep your company posted and will do my best to supply your wants."

Defendant to plaintiff:

"Aug. 17th.

"We desire to have you forward us at once a sample of cotton regardless of the grade that measures full $1\frac{1}{8}$ inch staple, the length in staple being the point in question. Please let us have this sample at once with all expense charges to us."

Prairie Cotton Company wrote on bottom of this:

"Gentlemen: At present there is nothing in this market that will represent the cotton as required by you. In fact there is no cotton here at all. Will send type as soon as it can be obtained."

Plaintiff to defendant:

"Aug. 31, 1904.

"We sent you a few days ago types showing what we call very full $1\frac{1}{8}$ inch cotton, in fact it is $1\frac{1}{8}$ inch to 1 3-16 inch. Would be glad to know what you consider it. Kindly let us hear from you."

Defendant to plaintiff:

"Sept. 1, 1904.

"We are in receipt of your favor of the 28th ult. and are to-day in receipt of the sample of $1\frac{1}{8}$ inch staple cotton. We have gone over this cotton carefully and find that it will just about average $1\frac{1}{8}$ inch staple. So we will retain this sample as your type of full $1\frac{1}{8}$ inch staple cotton for future reference. We are now in the market for 100 bales of this cotton. Let us have your price—landed Clinton, shipment at once. We are also in the market for 150 to 200 bales cotton per month for each month until Sept. 1, 1905. See our letter of August 13th. Will such deliveries be satisfactory with you? Please let us know. We are now ready for your quotations from time to time. We desire the following grade: Strict middling. We purchase by Carolina mill rules."

Plaintiff to defendant:

"Sept. 3, 1904.

"Yours 2d to hand; contents noted. The sample sent you is very full $1\frac{1}{8}$ inch; in fact it is what we sell for $\frac{1}{8}$ to 3-16 cotton. We sold this cotton few days ago $12\frac{3}{4}$ landed; it is worth $11\frac{3}{4}$ here. We can land you 100 to 200 bales Sept. shipment say for $12\frac{1}{4}$, probably 12 cts. This character of cotton commands good premium. Can sell you commercial $1\frac{1}{8}$ inch or full 1 1-6 to $1\frac{1}{8}$ at much less price. Cheap cotton is a thing of the past; the crop is not made. Let us hear from you."

Telegram:

"Sept. 12.

"Let us ship you 25 bales to show you the style and character of the cotton. Eleven quarter. This quarter less than we are getting, but want make start with you as we are satisfied it will lead to business. Answer."

Defendant to plaintiff:

"Sept. 12.

"In reply to your esteemed favor of to-day by wire we replied as enclosed confirmation that we could not use the cotton at $11\frac{1}{2}$ cts. We are looking for $10\frac{1}{2}$ ¢ cotton to-day and lower during the week. We thank you for your offers and hope to have them continually."

Plaintiff to defendant (telegram):

"Sept. 13.

"We want answer ours last night. Important. You will be pleased with the cotton. Can sell cotton elsewhere if you cannot use."

Defendant to plaintiff (telegram):

"Sept. 13.

"Will take 25 bales 11 cts. if immediate shipment. Answer."

Plaintiff to defendant:

"Sept. 13.

"Telegram received. Will ship 25 bales eleven. This complimentary shipment as we are anxious you try cotton, believing same will result to our mutual benefit; cotton goes forward to-morrow."

"Sept. 13.

"Your telegram accepting 25 bales $1\frac{1}{8}$ inch St. middling, to hand. We replied would ship you the cotton more as a compliment than as a monetary basis. Now you gentlemen will find this lot to be full up, in fact the cotton will pull $1\frac{1}{8}$ to barely 3-16. We shipped it full in order that you could judge what the cotton is. You must, however, bear in mind that this is green cotton and will not hold up in weight like old cotton. We make a specialty of staple cotton from $1\frac{1}{8}$ to $1\frac{3}{8}$, and if you can pay the price we can furnish you with some satisfactory business. Now if you can use 1-16 to $1\frac{1}{8}$, or what is known as commercial $1\frac{1}{8}$, can cut the price, but if you expect to buy good first class stuff you must expect to pay first class prices. Hope this little 25 bales will lead to further business."

"Sept. 14.

"Yours to hand; contents noted. Not disputing your word, but can't buy $1\frac{1}{8}$ cotton such as we expect to ship you or call $1\frac{1}{8}$, at $10\frac{7}{8}$. You might buy what you and your friends call $1\frac{1}{8}$, and what suits your trade fully as well as if you were getting the actual $1\frac{1}{8}$. We want your business and if the 25 bales now going to you not better and worth more money than the $1\frac{1}{8}$ you speak of having bought at $10\frac{7}{8}$ we will give you the cotton. We would like to see what you call $1\frac{1}{8}$, or what suits your trade for $1\frac{1}{8}$; there are a good many different ideas of $1\frac{1}{8}$ cotton, but only one of the actual stuff itself. We sold you the 25 bales $\frac{1}{2}$ ct. less than we could have gotten East."

Defendant to plaintiff:

"Sept. 17.

"We forward telegrams as enclosed confirmation to-day. Please rush this 25 bales of cotton with all despatch; we wish for it to reach Clinton next week without fail as we desire to use it along with other cotton we have. We are in receipt of your favor of the 14th instant and note what you have to say and are interested."

Telegram:

"Sept. 17.

"On what day was 25 bales cotton shipped? Answer."

Plaintiff to defendant (telegram):

"Sept. 17.

"Telegrams received. Bill lading and documents taken out fourteenth. Cotton went via Birmingham and Southern Railway."

Defendant to plaintiff:

"Sept. 21.

"Up to this time we have never received the 25 bales of cotton nor B. L. through bank to show shipment. We are unable to trace and we desire that you institute a telegraphic tracer after the lot and see that we get the cotton this week without fail."

Plaintiff to defendant (telegram):

"Sept. 28.

"Offer one hundred strict to good middling full inch eighth eleven quarter, handsome lot, can not do better. Answer early to-morrow."

Defendant to plaintiff:

"Sept. 28.

"Your telegram received offering 100 bales $11\frac{1}{4}$ inch strict to good middling full $11\frac{1}{4}$ cts. We have not yet received the 25 bales of sample cotton shipped by you; we would like to see this cotton before purchasing further. We do not wish to buy at $11\frac{1}{4}$ cts. as we are confident there will be a great decline in cotton within the next 30 or 40 days."

"Oct. 4.

"We are just to-day in receipt of your sample lot of 25 bales. We supposed that it had been lost in transit. The lot lost 270 lbs.; according to Carolina mill rules you are entitled to 3 lbs loss per bale. You will please remit for amount per bill enclosed less your 3 lbs. Please quote us immediately on receipt of this letter your closest price for 1,800 bales of this cotton, $1\frac{1}{4}$ inch staple exactly as your type shown in this 25 bales. Delivery of this 1,800 bales to be made to the mill 200 bales each month until the contract is exhausted. You must give your closest figures to interest us."

Plaintiff to defendant (telegram):

"Oct. 7.

"Offer one hundred or two hundred shipment this month equal the 25 bale lot in staple, eleven cents. It requires time and care to select this character of cotton, which is not very abundant, probably shade this price quarter if answer early to-morrow."

Defendant to plaintiff:

"Oct. 7.

"We are in receipt of your wire offering 100 or 200 bales this month at 11 cts. same as sample lot of 25 bales. We have just purchased some of this cotton at $10\frac{1}{4}$ cts. and with this before us we consider your price too high. If on receipt of this letter you desire to sell us from 200 to 500 bales of this cotton landed Clinton $10\frac{1}{4}$ cts. to be delivered 100 bales Oct., 200 Nov. and 200 Dec., please wire us for acceptance."

Plaintiff to defendant (telegrams):

"Oct. 9.

"Would advise you taking on more from same parties at price named, $10\frac{1}{4}$. can not supply your wants at such price."

"Oct. 10.

"Quote $1\frac{1}{4}$ average st. middling, nothing below middling, eleven, if limit impracticable answer the best you can do, will execute order if possible for 100, answer early to-morrow."

Defendant to plaintiff (telegram):

"Oct. 10.

"Offer ten fifty hundred bales like sample lot. Answer."

Plaintiff to defendant (telegrams):

"Oct. 10.

"Telegram received. Your limit impracticable for us. We sold to-day same cotton eleven cents; will sell you hundred this price; we can not do better, market firm, if accepted answer at once."

"Oct. 11.

"Will ship you one hundred or two hundred ten three-quarters; we are giving you full inch eighth cotton; if you care to shade staple a little can do the business for less; we make this offer to keep business going with you; answer early to-morrow sure, cannot do better."

Defendant to plaintiff (telegram):

"Oct. 11.

"Offer ten fifty hundred bales full inch eighth. Answer."

Plaintiff to defendant (telegrams):

"Oct. 12.

"Telegram received all right. Will ship you one to two hundred bales inch eighth, ten half, average. Strict middling, nothing below middling. You have bought some cheap cotton. Confirm."

"Oct. 13.

"Do you confirm one or two hundred on sale made you to-day? Either amount satisfactory to us. If you want the two hundred will ship. Answer."

Defendant to plaintiff:

"Oct. 13.

"We are in receipt of your telegram offering us the 100 to 200 bales full $1\frac{1}{8}$ inch cotton $10\frac{1}{2}$ cts. We have wired you as enclosed confirmation that we would take 200 bales. We will be pleased to have you ship 100 bales of this cotton now and if agreeable we would like to have the other 100 bales shipped any time between Nov. 1st and 10th. We understand this cotton is to be full $1\frac{1}{8}$ inch staple, same as the staple in the 25 bale sample lot you shipped to us, the grade to be average strict middling, nothing middling. We desire that you be particular in the selection of this cotton as nothing less than full $1\frac{1}{8}$ inch, same type as the sample lot, will be suitable to us. Please route via Birmingham, or Atlanta, and S. A. L. R. R. to Clinton, S. C., as this routing will give us a much quicker shipment."

The principal witness examined for the plaintiff in the trial was a man by the name of Fowler, the owner and general manager of the business of the plaintiff, who conducted the correspondence with defendant. Fowler admitted that the 150 bales which defendant declined to accept was of the same grade and the same character of cotton as the 50 bales which had been sent before with bill of lading attached; and he further admitted that none of the 200 bales, composed, as stated, of the 50 bales first sent under the contract of purchase and the 150 bales which were refused, was of as high grade of cotton as the 25 sample bales; and it was also shown, by the undisputed evidence, that the 25 sample bales was not only a better grade of cotton than the 200 bales, but also commanded a higher price in the market.

The prime question, therefore, is what the contract between the plaintiff and the defendant was. The counsel for the plaintiff contends that the question as to whether the plaintiff complied with the terms of the contract or not was for the jury to determine. It is true,

as a general proposition, that where the issue is one of fact as to the performance of the terms of a contract, it is the province of the jury to pass upon it. But before the question of compliance or noncompliance arises, there must be a determination of the terms of the contract itself. In case of an oral contract, where the parties disagree as to its terms, or an ambiguous written contract, in which testimony aliunde is offered to explain its meaning, the intervention of a jury is often necessary. But in that of a written contract showing the whole of the agreement, couched in terms such as to render it capable of intelligent interpretation, its construction is for the court, and not for the jury. In our opinion, the contract between the parties to this controversy is of the latter kind. It is all contained in the correspondence above set forth, and we think that the intention of the parties to the contract at the time of the correspondence is readily gathered. To our minds there is no uncertainty or ambiguity about it, and a proper construction of it is that the defendant contracted to buy 200 bales of cotton from the plaintiff of the character, grade, and quality of the 25 bales which had been theretofore sent as a sample. There is no contention that the cotton shipped under the contract fulfilled these requirements.

On the other hand, plaintiff admits that it did not. It is a well-settled rule that courts will ascertain what parties to a contract have agreed to by what they have said and by the meaning of the words used to express their intention. This doctrine is elementary.

In this case it appears from the record that defendant's motion for verdict or nonsuit was made at the conclusion of plaintiff's testimony, and that upon the refusal of the court to grant the motion the defendant introduced a witness by the name of Bailey, who testified as follows:

"Mr. Serrine: Q. State to the jury plainly what you and Mr. Dougherty said that day. A. Mr. Dougherty came into my office the day of the arrival, and I sent over to the warehouse where we had this cotton, this 50 bales of cotton, and had him to go through it, and he came back to my office, and I carried him into my private office with Mr. Smart, and we asked him what he considered the cotton, and he said that he called it $1\frac{1}{8}$ ". We brought out the samples of the 25 bales and laid them beside the desk in which we had the cotton that we had received, and we said to him: 'Do you consider this cotton the same as the 25 bales?' He said: 'I do not.' And he said: 'Well, I would like to make some settlement of this matter.' And we told him we were very anxious to settle it, that we were needing cotton, and were in a straight right now. We asked him what he wished to do, and he said he did not know. I said: 'Well, Mr. Dougherty, we will state our position in this matter, and we will tell you what we will do. If you will have your people to authorize the bank to release the drafts so the railroad people can deliver this cotton to us, you can have our warehouse at your disposal, and you can draw the samples from this cotton, and you can arbitrate according to the Carolina Mill Rules, and if that is not satisfactory you can send them to New York and have them classified, and if, after the cotton has returned, you lose in the case, we will charge you not a cent for the storage of this cotton in our hands.'

"Q. What did he say to that? A. He said he would not do it.

"Q. Did he say anything about his authority to do or not to do that? A. Well, the impression was that he had the full authority.

"Q. You spoke of the Carolina Mill Rules, are these the rules, July 15, 1904

(handing witness book entitled 'Rules Known as the Carolina Mill Rules and Governing Sale of Cotton to Domestic Mills')? * * * A. Yes, sir."

The defendant did not renew the motion at the conclusion of all the testimony. Plaintiff's counsel have made no point, either in the brief or in the oral argument, because of the omission of defendant's counsel to renew the motion for nonsuit at the close of all the testimony. Under these circumstances we think the court may well assume that plaintiff's counsel waived objection, if such there might be, to this failure, and did not intend to take advantage of the omission of defendant's counsel in this respect. We are led, however, to consider this point because of the fact that in the conference of the judges and upon an examination of the record it is called to our attention, and the question has arisen, as to whether or not by this omission the defendant has not forfeited its right to be heard.

In *Accident Insurance Company v. Crandal*, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. Ed. 740, the Supreme Court lays down the rule that the refusal of the court to instruct the jury at the close of plaintiff's evidence that she was not entitled to recover cannot be assigned for error, because the defendant, at the time of requesting such instructions, had not rested its case, but afterwards went on and introduced evidence in its own behalf. In support of this decision, the Supreme Court cites *Grand Trunk Railway Company v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266, in which it was held that the refusal to direct a verdict on motion of defendant at the close of plaintiff's testimony could not be reversed, if the defendant, after such refusal, offers testimony which does not appear in the record. The reason for the principle laid down in the case last cited is readily apparent: That although the testimony offered by plaintiff may not, in itself, have been sufficient to warrant a verdict, yet the court was entitled to see what effect the testimony of defendant, subsequently offered, may have had upon the issues involved, for it frequently occurs in the trial of causes that the testimony of the defendant, upon cross-examination of witnesses or disclosures otherwise made, has the tendency to strengthen rather than weaken plaintiff's case. It was therefore important that the defendant's testimony should be set out in the record, that the court might see and determine, upon all of the testimony, as to whether or not the case should have gone to the jury. This view seems to be strengthened by the opinion in *Northern Pacific Railroad Company v. Mares*, 123 U. S. 710, 8 Sup. Ct. 321, 31 L. Ed. 296. When all of the evidence had been submitted, the defendant demurred to the evidence and moved the court to dismiss the action, which the court refused to do. Thereupon the defendant requested the court to direct a verdict, which was also refused and exception taken. The Supreme Court, in the opinion, says that:

"The question raised by the ruling and the exceptions thereto is whether there was sufficient evidence to justify the court in submitting the case to the jury."

Then the court proceeds to state the fact which the evidence tends to establish and decides that there was enough to go to the jury on the question involved in the case, viz.:

"That the defendant, by the negligence of an engineer in its employment, caused the injury to the plaintiff."

The testimony of the witnesses offered by the defendant in the case now under consideration in no way affects that offered by the plaintiff. It corroborates, substantially, the testimony of the agent of plaintiff, to the effect that the 150 bales of cotton which the defendant refused to accept was not of the same character or grade as the 25 bales which were sent to the defendant by the plaintiff as a sample. This is all the testimony of defendant's witness which we deem material; the remainder of it pertaining to negotiations between the parties after the refusal to accept the 150 bales looking to an amicable adjustment of the controversy. We do not think that the rule of practice laid down in *Grand Trunk Railway Company v. Cummings* and in *Insurance Company v. Crandal*, above cited, applies in the case before us. The principle in our case is that there was no issue of fact for the jury at all, upon any of the evidence or upon all of the evidence. The question was one solely for the court—the construction of a written contract, plain in its terms. There was no contradiction as to the telegrams and letters which contain the terms of the contract; these being capable of intelligent construction, setting out the agreement of the parties in unmistakable terms that plaintiff agreed to deliver to the defendant a certain grade of cotton like a sample lot of 25 bales shipped by the plaintiff to the defendant in the outset. The plaintiff admitted that the cotton in controversy was not of that grade, but contended that the contract did not call for it. The defendant's witness simply corroborated the fact that the cotton shipped was not of the quality and grade of the sample lot. The construction of the contract, as set forth above in this opinion, being for the court, there was no issue of fact for the jury. In all of the cases we have examined on the point we are now discussing, there was some evidence relating to the fact at issue, and the rule was laid down that if a defendant failed, after introducing testimony, to renew the motion to direct a verdict made at the close of plaintiff's case, the refusal of the trial court to grant the motion could not be assigned as error.

We regard *Insurance Company v. Crandal* and *Railroad Company v. Mares*, *supra*, as the leading authorities upon the point in question, and it will be observed that in both of these cases, the motion was that the court instruct the jury to return a verdict for the defendant. A motion of this character invoked the power of the court, after considering the testimony and all of it in its various aspects, and giving to it and every part of it its due weight, with all legal and reasonable inferences to be drawn therefrom, to determine whether or not it was sufficient to warrant a verdict for the plaintiff. But such is not the situation in the case here. The motion of defendant's counsel was not to direct a verdict, but nonsuit the plaintiff on the ground that the contract required of it the delivery of a certain grade of cotton, according to a sample which had theretofore been furnished, and, if such were the contract, plaintiff admitted the nonperformance, and therefore could not maintain its action against the defendant for an alleged breach. The motion of defendant was based solely upon a prop-

osition of law, and no issue or question of fact was involved. We do not think therefore that any question in regard to the rule of practice referred to arises. We construe the contract as we have before stated in this opinion, and, such being our construction, with plaintiff's admission of nonperformance, there was not even a scintilla of evidence to go to the jury to support a finding for the plaintiff. We think the learned judge on the trial court should have entered a nonsuit, as requested by defendant, and the refusal to do so was error.

There is error, for which the judgment of the Circuit Court is reversed.

Reversed.

McDOWELL, District Judge, dissents.

(154 Fed. 353.)

McCALMONT v. LANNING.

(Circuit Court of Appeals, Third Circuit. April 19, 1907.)

No. 9.

BANKS AND BANKING—DISCOUNT OF FRAUDULENT PAPER—KNOWLEDGE OF OFFICER.

A bank is not chargeable with notice of fraud in the inception of a note which it discounted merely because its president had knowledge of the facts, which was gained by him in his capacity as an officer of another corporation, where he had nothing to do with the discounting of the note, and had no knowledge of it at the time.¹

In Error to the Circuit Court of the United States for the District of New Jersey.

E. R. Walker, for plaintiff in error.

John S. Applegate, for defendant in error.

Before GRAY and BUFFINGTON, Circuit Judges, and LANNING, District Judge.

BUFFINGTON, Circuit Judge. In this case John E. Lanning, receiver of the Monmouth Trust & Safe Deposit Company, brought suit against Robert McCalmont on a negotiable promissory note for \$5,000, dated January 28, 1903, payable to his own order in four months, and by him indorsed. The court below gave binding instructions for plaintiff, which action is here assigned for error.

After examining the proofs, we are of opinion there was, under the proofs, no question to submit to the jury. Assuming, for present purposes, that fraud was practiced on the defendant in securing from him the note for the stock of the Fraser Mountain Copper Company, and that Twining, the president of that company, had knowledge of that fact, still the mere fact that such officer was also president of the plaintiff company does not visit the latter with notice. There is nothing in the record tending to show that the trust company did not discount

¹ See note at end of case.

the note in good faith before maturity, or that Twining had anything to do with, or indeed knew of, its discount. Now in *Willard v. Denise*, 50 N. J. Eq. 482, 26 Atl. 29, 35 Am. St. Rep. 788, it is held that to visit a bank with knowledge of its officer, gained in another relation, two things are necessary: First, possession by the agent of pertinent information; and, second, such agent's participation in the discount or purchase on behalf of the corporation. In view of that case and of *First National Bank v. Christopher*, 40 N. J. Law, 439, 29 Am. Rep. 262, and *Barnes v. Trenton Gaslight Co.*, 27 N. J. Eq. 33, we hold the trust company was not visited with the knowledge of its president, Twining, and was, therefore, an innocent purchaser.

The remaining question relates to a dispute as to whether the trust company paid a certain check of the Fraser Mountain Copper Company, and charged that company with such payment. The plaintiff in error contends there was evidence tending to show that the sum of \$6,678.81 (being the amount for which the check is alleged to have been given) was, after February, 1905, fraudulently entered as a debit item in the account of the Fraser Mountain Copper Company, and that the trial court erred in not submitting that evidence to the jury on the question of alleged fraud. Now such question of fraud rests wholly on the testimony of Percival Kroehl, who says he examined the ledger account of the Fraser Mountain Copper Company in February, 1905; that the foregoing item of \$6,678.81 was not in it at that time, and that he then made a copy of the account which shows that fact. An examination of the proofs shows to a demonstration that he overlooked that item in making his copy. Without going into a full analysis, it suffices to say that Kroehl's copy shows a credit balance of \$184.02 when he made it. Now that balance cannot be obtained from the items in his copy unless the item of \$6,678.81 is placed in the debit column. When to this is added the uncontradicted testimony of the accountant of the banking department of the state of New Jersey that he examined the books in February, 1903, and not only then found the item in the account, but that he found it also in a check list kept by the trust company, it conclusively appears that the item had been paid on the check above mentioned. There being no evidence upon which the court could have sustained a verdict in favor of the defendant, a direction to find in favor of the plaintiff was not error. *Randall v. Baltimore & Ohio R. R. Co.*, 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003.

The judgment is affirmed.

NOTE.

Knowledge or Notice Acquired by Officer, or Agent of Bank, in Private Business or Outside Scope of Duties, as Affecting Its Liability.

I. IN GENERAL.

[a] (U. S. 1898) A president of a national bank has no power, in the ordinary course of business, to certify to the fidelity or integrity of the cashier for the purpose of enabling him to procure a bond insuring his fidelity: and hence the bank cannot be deemed, merely by virtue of the president's relation to it, to have any knowledge of the giving by him of such certificate.—Amer-

ican Surety Co. of New York v. Pauly, 170 U. S. 133, 42 L. Ed. 977, 18 Sup. Ct. 552.

[b] (Md. 1903) Notice to a director of a banking corporation privately, or acquired by him generally through channels open to all persons, and which he does not communicate to his associates in the management of the corporation, is not binding on the same.—Black v. First Nat. Bank, 96 Md. 399, 54 Atl. 88.

[c] (Mo. 1898) Knowledge of the cashier of a bank, obtained by reason of his interest, and connection with other parties, but not obtained in the performance of any duty he owed to the bank, is not notice to the bank.—National Bank of Commerce v. Fitze, 76 Mo. App. 356.

[d] (N. Y. 1833) Notice to a bank officer binds the bank only when it is the duty of such officer to act on the information, or transmit it to the bank.—Fulton Bank v. New York & Sharon Canal Co., 4 Paige, 127.

[e] (N. Y. 1841) Notice of the dissolution of a firm with which a bank has business relations, where published in a newspaper, and accidentally reaching a director, who has no power to act for the bank except in conjunction with others, is not equivalent to actual notice to the bank.—National Bank v. Norton, 1 Hill, 572.

[f] (N. Y. 1842) Notice to a bank director, or knowledge obtained by him while officially not engaged in the business of the bank, will not affect the bank.—Bank of United States v. Davis, 2 Hill, 452.

[g] (N. Y. 1867) Notice to a director of a bank as an individual, and not acting as such director, cannot operate to the prejudice of the bank.—Westfield Bank v. Cornen, 37 N. Y. 320, 93 Am. Dec. 573.

[h] (Pa. 1840) Knowledge of a material fact communicated by a bank director to the board at a regular meeting is notice to the bank.—Bank of Pittsburgh v. Whitehead, 10 Watts, 397, 36 Am. Dec. 186.

[i] (Pa. 1848) Notice to a bank director, not being an organ of communication with the corporation, is not notice to the corporation, though he is present when the corporate act is afterwards done which is sought to be affected by the notice.—Custer v. Tompkins County Bank, 9 Pa. (9 Barr) 27.

[j] (Tenn. 1843) Where notice of the dissolution of a firm is communicated to a bank director for the purpose of being communicated to the board of directors, or where he is called upon to act as a director in a transaction affecting the interests of the members of the dissolved firm, he is bound to communicate that knowledge to the bank, and, if he do not, the bank is by law charged with notice of the facts so withheld.—Union Bank v. Campbell, 23 Tenn. (4 Humph.) 394.

[k] (Tenn. 1901) Notice acquired by the president in a private transaction is not chargeable to the bank.—Smith v. Carmack, 64 S. W. 372.

[l] (Wash. 1893) Notice of facts concerning transactions which it is the duty of the cashier of a bank to conduct is not binding on the bank when received by the president in conducting business of another company, of which the president was director, and which business was in no way connected with the bank.—Washington Nat. Bank v. Pierce, 6 Wash. 491, 33 Pac. 972, 36 Am. St. Rep. 174.

[m] (Wis. 1896) On an issue whether the plaintiff bank had knowledge of the preference of a creditor of its debtor, it was proper to charge that the bank was not chargeable with knowledge of its directors acting individually, but that the jury might consider the knowledge of the directors as tending to prove knowledge on the part of the bank.—Continental Nat. Bank v. McGeech, 92 Wis. 286, 66 N. W. 606.

II. DISCOUNTS.

[a] Where an officer or director of a bank is also an officer of a corporation discounting a note at the bank, his knowledge, acquired in the latter capacity, is not chargeable to the bank.

—(Mass. 1890) Corcoran v. Snow Cattle Co., 151 Mass. 74, 23 N. E. 727;

(Minn. 1881) First Nat. Bank v. Loyhed, 28 Minn. 396, 10 N. W. 421;

(Mo. 1894) Benton v. German-American Nat. Bank, 122 Mo. 332, 26 S. W. 975;

(N. C. 1892) Commercial Bank v. Burgwyn, 110 N. C. 267, 14 S. E. 623, 17 L. R. A. 326;

(N. Y. 1893) *Casco Nat. Bank v. Clark*, 139 N. Y. 307, 34 N. E. 908, 36 Am. St. Rep. 705, affirming (1892) 64 Hun. 634, 18 N. Y. Supp. 887; (Pa. 1886) *Wilson v. Second Nat. Bank*, 7 Atl. 145.

CONTRA, see

(Neb. 1887) *First Nat. Bank v. Erickson*, 20 Neb. 580, 31 N. W. 387;
(N. M. 1895) *Oak Grove & Sierra Verde Cattle Co. v. Foster*, 41 Pac. 522.

[b] Where a person having a note discounted at a bank for his personal benefit is an officer of the bank, the bank is charged with his knowledge of defenses to it.

—(U. S. 1894) *First Nat. Bank v. Blake (C. C.)* 60 Fed. 78;
(Mich. 1880) *Tilden v. Barnard*, 43 Mich. 376, 5 N. W. 420, 38 Am. Rep. 197;
(N. C. 1892) *Le Duc v. Moore*, 111 N. C. 516, 15 S. E. 888;
(S. D. 1893) *Black Hills Nat. Bank v. Kellogg*, 4 S. D. 312, 56 N. W. 1071;
(1895) *Taylor v. National Bank*, 6 S. D. 511, 62 N. W. 99.

CONTRA, see

(Mass. 1894) *First Nat. Bank v. Babbidge*, 160 Mass. 563, 36 N. E. 462;
(Mo. 1892) *National Bank v. Lovitt*, 114 Mo. 519, 21 S. W. 825, 35 Am. St. Rep. 770;
(Neb. 1894) *Buffalo County Nat. Bank v. Sharpe*, 40 Neb. 123, 58 N. W. 734;
(N. Y. 1828) *City Bank v. Barnard*, 1 Hall, 70.

[c] Where a director of a bank is a member of a firm discounting a note at the bank, his knowledge in respect to the note, not actually communicated to other officers or directors, does not charge the bank.

—(N. J. 1878) *First Nat. Bank v. Christopher*, 40 N. J. Law (11 Vroom) 435, 29 Am. Rep. 262;
(N. Y. 1880) *Atlantic State Bank v. Savery*, 82 N. Y. 291, affirming (1879) 18 Hun. 36.

[d] (U. S. 1897) Knowledge by a member of a firm of the true consideration of a certificate of deposit, which the firm discounted at a bank in payment of individual notes of one of its members, and which had been negligently altered in making out a duplicate certificate, *held* to be imputable to the bank, where the other member of the firm was its president, and, as such, acted as the sole representative of the bank in accepting the certificate. 74 Fed. 1000 (1896) affirmed.—*Niblack v. Cosler*, 80 Fed. 596, 26 C. C. A. 16.

[e] (U. S. 1898) That the president of a corporation for which a bank discounted notes, in the ordinary and usual course of its business, was vice president of the bank, and that the secretary, who represented the corporation in the transaction, was also a director of the bank, do not charge the bank with notice of a secret infirmity in one of such notes, where neither of such officers represented the bank in the transaction.—*Holm v. Atlas Nat. Bank*, 84 Fed. 119, 28 C. C. A. 297.

[f] (U. S. 1881) Where a bank director is also president of a railroad company, his knowledge, in respect to notes discounted at the bank by the railroad company, is not chargeable to the bank, where he refused to take any part in the proceedings of the discount committee.—*Waynesville Nat. Bank v. Irons (C. C.)* 8 Fed. 1.

[g] (U. S. 1882) Where a bank discounts a note for a director, he not being present, it is not charged with his knowledge of antecedent illegalities.—*Third Nat. Bank v. Harrison (C. C.)* 10 Fed. 243.

[h] (Conn. 1857) The knowledge of a director of a bank, as to the object for which certain bills of exchange were delivered to a party applying to the bank for a discount thereof, such director not being present at the meeting of the directors at which such application was made and such bills discounted, and not having communicated his knowledge to any other director or officer of the bank, is not to be regarded as notice to the bank.—*Farmers' & Citizens' Bank v. Payne*, 25 Conn. 444, 68 Am. Dec. 362.

[i] (Ga. 1895) Where the president and cashier of a bank, being also members of a partnership composed of themselves and another person, to the capital stock of which they had, under the partnership articles, agreed to contribute a given sum, without the knowledge or consent of the other partner exe-

cuted and delivered to the bank a note in the name of the partnership, for the purpose of raising the money they had agreed to pay into the partnership business, the bank was affected with notice that the transaction was for the private benefit alone of the two parties raising the money, and hence could not hold the partnership itself, nor the remaining partner, liable on the note.—*Brobston v. Penniman*, 97 Ga. 527, 25 S. E. 350.

[j] (Ga. 1901) Notice or knowledge of failure of consideration of a negotiable note, which the director of a bank sells to it before the maturity of the paper, is not imputable to the bank, when in the transaction the seller did not act for it at all, but exclusively for himself, and the bank was represented by another of its officials, who alone acted for it.—*English-American Loan & Trust Co. v. Heirs*, 112 Ga. 823, 38 S. E. 103.

[k] (La. 1858) Where a note is discounted by a bank, at the instance of a director, who knows, but fails to disclose, a condition on which it was given, the bank will not be considered cognizant of the condition.—*Louisiana State Bank v. Senecal*, 13 La. 525.

[l] (Mass.) The circumstance that an indorser of a discounted note was a director in the bank by which it was discounted will not be deemed constructive notice to the bank that the note was made for his accommodation.—(1837) *Commercial Bank v. Cunningham*, 41 Mass. (24 Pick.) 270, 35 Am. Dec. 322; (1839) *Washington Bank v. Lewis*, 39 Mass. (22 Pick.) 24.

[m] (Mass. 1877) Although the mere fact that a director knew of fraud or illegality in the inception of a note discounted by his bank will not prevent the bank from recovering thereon, yet, if he also acts for the bank in discounting the note, the bank is affected by his knowledge.—*National Security Bank v. Cushman*, 121 Mass. 490.

[n] (Mich. 1882) The fact that one who recommends to the managing officers of a bank to discount certain negotiable paper is a director of the bank does not charge the bank with knowledge which the director possessed.—*Shaw v. Clark*, 49 Mich. 384, 13 N. W. 786, 43 Am. Rep. 474.

[o] (Mich. 1902) Where a bank purchased a note from a corporation which had received it without consideration, the fact that its cashier, who discounted the note after consultation with the directors, was the president of such corporation, and knew all the facts, did not bind the bank with notice of the infirmities.—*People's Sav. Bank v. Hine*, 131 Mich. 181, 91 N. W. 130.

[p] (Mo. 1882) Where a bank director procures a note on which he is indorser to be discounted for his benefit at a bank, his knowledge of illegality in the consideration does not charge the bank.—*Third Nat. Bank v. Tinsley*, 11 Mo. App. 498.

[q] (N. J. 1878) A bank discounting a note before maturity is not chargeable with knowledge of illegality or want of consideration acquired by one of its directors in other than his official capacity, if such director did not act with the board in making the discount.—*First Nat. Bank v. Christopher*, 40 N. J. Law (11 Vroom) 435.

[r] (N. Y. 1893) To charge a bank discounting a note with the president's knowledge of equities between the parties, it is necessary that the knowledge should have come to him in his official capacity.—*Merchants' Nat. Bank v. Clark*, 139 N. Y. 314, 34 N. E. 910, 36 Am. St. Rep. 710.

[s] (Ohio, 1857) Where the payee of a note happens to be a director of the bank that discounts the note for his benefit, without notice of the maker's claim for recoupment, the bank can recover as an innocent bona fide holder without notice. The private knowledge of an officer is not the knowledge of the bank.—*Loomis v. Eagle Bank of Rochester*, 1 Disn. 285.

[t] (R. I. 1905) D., who was president of a trust company, was also the controlling stockholder in a manufacturing corporation and the principal partner of D. & Co., a firm acting as the corporation's selling agent. At D.'s dictation, the president and treasurer of the corporation drew drafts on D. & Co., which were accepted by that firm and discounted at D.'s instance by the trust company. Just prior to the discount, the president of the corporation, at D.'s instance, opened an account with the trust company in the name of the corporation, and on the day before the discount was made two checks were drawn on the trust company by the corporation, payable to D. & Co., and cashed through another New York bank, the drafts being discounted to

meet the checks. The discounts made by the trust company were authorized by D. under a provision of the trust company's by-laws declaring that the president generally might make investments between meetings of the executive committee, reporting the transactions to the committee on the succeeding day, and, after the discounts were made, the minutes showed the approval of loans made by the trust company. *Held*, that the trust company was thereby charged with knowledge that the discounts were part of a fraudulent scheme on the part of its president to obtain money for his individual purposes.—*Cook v. American Tubing & Webbing Co.*, 28 R. I. 41, 65 Atl. 641, 9 L. R. A. (N. S.) 193.

[u] (S. C. 1881) A manufacturing company having sold out all its property, thereby determining the agency of its officers, a bank, the president of which was also a director of the corporation, was bound by the legal effect of its president's knowledge in receiving a note executed to it by the officers of the corporation after the sale.—*Union Bank v. Wando Mln. & Mfg. Co.*, 17 S. C. 361.

[v] (S. D. 1897) Where a partner sells to a bank of which he is cashier a note due the firm, and the bank acts wholly through its discount committee, of which he is not a member, it is not affected with knowledge possessed by him of infirmities in the note.—*National Bank of Commerce v. Keeney*, 9 S. D. 550, 70 N. W. 874, 46 L. R. A. 732.

[w] (Tex. 1906) A bank, purchasing a note subject to certain defenses in the hands of the payee, is not bound by the knowledge or information of such defenses that may have come to its officers at a time when they were not engaged in its business, but when they were acting for themselves individually.—*Grayson County Nat. Bank v. Hall*, 91 S. W. 807.

[x] (Vt. 1898) Where a bank director and a cashier executed a note as makers, the director being in fact only a surety for the cashier, who obtained a loan on it from the bank, without any other bank official having knowledge of the suretyship, the director was liable as principal, since knowledge to him and the cashier, in such case, was not knowledge to the bank.—*First Nat. Bank v. Briggs' Assignees*, 70 Vt. 594, 41 Atl. 580.

III. DEPOSITS OF MONEYS OR BONDS.

[a] (Ky. 1890) A bank duly selected as a depository of money collected by way of taxes to satisfy county bonds issued in aid of a railroad company cannot be held responsible for money which it pays out by order of the committee having charge of the fund on the ground that an excess of bonds has been issued, in the absence of fraud or collusion between it and the committee, although the president of the bank was the president of the railroad company, and one of the committee was cashier of the bank, and secretary of the railroad company.—*Deposit Bank of Owensboro v. Davless County Court*, 12 S. W. 930, 13 S. W. 101, 11 Ky. Law Rep. 681.

[b] (N. Y. 1879) Plaintiff's husband took a bond of hers and her bank book to the cashier of a bank. The cashier put the bond in the bank safe, and wrote on plaintiff's bank book a memorandum showing a receipt of the bond from plaintiff. *Held*, that the bank could not claim that the cashier was acting in his individual capacity alone, and that the bank had no notice of plaintiff's title.—*Zugner v. Best*, 44 N. Y. Super. Ct. (12 Jones & S.) 393.

IV. COLLATERAL.

[a] (Mass. 1839) Where one of the directors of a bank obtained possession of a note under the pretense of getting it discounted for the maker, and pledged it to the bank for a loan to himself, and to secure a prior existing debt due from such director, it was *held* that, as he did not act in his capacity of a director in procuring the discount and making the pledge, the bank was not affected by his knowledge of the circumstances under which he received the note, and might recover against the maker the amount of the whole note, provided it did not exceed the amount of the money advanced and the prior debt.—*Washington Bank v. Lewis*, 39 Mass. (22 Pick.) 24.

[b] (Mass. 1885) The fact that one who pledged to a bank, as security for a loan to him, goods consigned to him for sale, was a director of such bank,

does not charge the latter with knowledge, though the director was present at the meeting when the loan was voted.—*Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710.

[c] (N. Y. 1901) The knowledge of the president of a bank as to his own insolvency, or that of a firm with which he was connected, could not be imputed to the bank receiving securities in connection with certain overdrafts and loans of the president, where such president dealt with the bank in regard to his own affairs as with a third party.—*Crooks v. People's Nat. Bank*, 34 Misc. Rep. 450, 70 N. Y. Supp. 271.

[d] (Tenn. 1895) Where an agent of an undisclosed principal, holding bonds as collateral, with notice that, subject to such pledge, they have been transferred as collateral to another, surrenders them to the pledgor, who, from proceeds obtained from a sale thereof, pays a debt to a bank of which such agent is president, having been urged by such president to make a payment, the bank will be liable, for the money so received, to the one having the secondary rights in the bonds as security; the president, and through him the bank, being charged with notice how the money was obtained.—*Hughes v. Settle* (Ch. App.) 36 S. W. 577.

V. CONVEYANCES, MORTGAGES, OR LIENS.

[a] (U. S. 1882) An insolvent firm, two members of which were president and cashier of a bank, on the eve of bankruptcy conveyed their bank stock to the bank, in pursuance of a prior verbal hypothecation. An action was brought by the receiver of the firm to set aside the transfer. *Held*, that the knowledge of the officers of the insolvency of their firm was the knowledge of the bank.—*Nisbit v. Macon Bank & Trust Co.* (C. C.) 12 Fed. 686.

[b] (Colo. 1896) Whether one who, at different times during a period extending from 3 years down to 10 or 11 months prior to a levy of a writ of attachment in a suit by the bank of which he was and had been the president, had been frequently told in the course of his private business of a third ownership of the property levied on, still retained that knowledge at the time the attachment suit was begun, is a question for the jury.—*Campbell v. First Nat. Bank*, 22 Colo. 177, 43 Pac. 1007.

[c] (Ky. 1831) Where a director of a bank was one of the grantees in an unrecorded deed of property, which the grantor subsequently conveyed to the bank, the director's knowledge of the prior deed is not notice to the bank of its existence, if such director be interested in protecting his own title by not communicating his knowledge to the board of directors.—*Lyne v. Bank of Kentucky*, 5 J. J. Marsh. 560.

[d] (La. 1853) When a bank deals with a mortgagor on the faith of his apparent title, a private knowledge of its simulation in two of the directors, who are not clothed with any special authority in the premises, and who constitute a small minority of the whole number, which knowledge was undisclosed to the board, cannot destroy the rights of the corporation as a bona fide mortgagee.—*Mercier v. Canonge*, 8 La. Ann. 37.

[e] (Me. 1881) A trustee of a bank, who was also an attorney, had actual knowledge of an existing unrecorded deed of lands. With that knowledge, he, as such attorney, afterwards wrote and took an acknowledgment of a mortgage on the same lands from the same grantor to the bank, and the deed was recorded. *Held*, that the bank was not chargeable with his knowledge, unless the fact was in his mind at the time, nor unless he was acting for the bank in the making of the mortgage.—*Fairfield Sav. Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 319.

[f] (S. C. 1906) That an attorney of a corporation knew of a lien on property purchased by the corporation does not show notice to a bank which made a loan to the corporation, though the attorney was president of the bank; nor does the fact that the president of the corporation knew of the lien constitute notice to the bank, though he is a director of the bank and a member of its loan committee.—*Wardlaw v. Troy Oil Mill*, 74 S. C. 368, 54 S. E. 658.

(155 Fed. 719.)

A. SANTAELLA & CO. v. OTTO F. LANGE CO. et al.

(Circuit Court of Appeals, Eighth Circuit. June 17, 1907. On Rehearing, September 3, 1907.)

No. 2,364.

1. CONTRACTS—CONSIDERATION—MUTUALITY.

There is want of mutuality, necessary for a valid contract, where plaintiff, the manufacturer of a certain cigar, offered to sell in the future to defendant, a cigar dealer, as many of such brand as he might desire for his wants, and to continue to do so during the life of the brand, as long as defendant cared to sell them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 344.

Mutuality in, see note to American Cotton Oil Co. v. Kirk, 15 C. C. A. 543.]

2. APPEAL—RECORD—QUESTIONS RAISED.

The question of want of mutuality in the contract on which a counterclaim is predicated is properly raised by the record; plaintiff having at the close of the evidence moved for an instructed verdict on the ground that defendant showed a failure of consideration on the part of plaintiff for the contract, and the overruling of the motion having been assigned as error, and such assignment insisted on in the brief.

3. SAME—REVIEW—RULES OF COURT.

The provision of Circuit Court of Appeals rule No. 11, that the court, at its option, may notice plain errors not assigned, reserves to the court, in the interest of justice, the right, resting in public duty, to take cognizance of palpable errors on the face of the record and proceedings, especially such as clearly demonstrate that the suitor has no cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2968-2982.]

In Error to the Circuit Court of the United States for the Northern District of Iowa.

George W. Kiesel and D. J. Lenehan (L. G. Hurd, on the brief), for plaintiff in error.

Nathan E. Utt (Alphons Matthews and John P. Frantzen, on the brief), for defendants in error.

Before SANBORN and HOOK, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. The plaintiff in error (hereinafter designated the plaintiff), an Illinois corporation, with its principal place of business in Chicago, sued the defendants in error (hereinafter designated the defendants), a copartnership, doing business at Dubuque, in two counts. The first count is predicated of a promissory note, executed by the defendants to the plaintiff February 23, 1903, for \$1,200, due in three months thereafter. The second count is based upon an open account for cigars sold by plaintiff to the defendants between the 6th day of March and the 5th day of May, 1903, amounting to \$4,415. The answer, in effect, admitted the debts as alleged, and then set up a counterclaim for damages in the sum of \$30,000, resulting from an alleged breach of contract in the failure and refusal of the plaintiff to ship to the defendants cigars as required. On

trial to a jury, at the close of the evidence, the plaintiff moved for a directed verdict, which was refused. The jury returned a verdict for the defendants in the sum of \$3,262.25, which, including the admitted sums owing to the plaintiff, amounted to \$9,087.75.

As counsel for the plaintiff insisted in argument here only upon the error assigned in the refusal of the court to direct a verdict, it is made necessary to disclose the case made on behalf of the defendants. The alleged contract was not in writing, and its character is to be found in the allegations of the counterclaim and the testimony of Otto F. Lange, representing the defendants in making the alleged contract. The answer, after some preliminary statements by way of inducement leading up to the contract, disclosed that the plaintiff was engaged in the manufacture and sale of a cigar known as the "Optimo" brand, which it was anxious to exploit in certain territory in Iowa and vicinity, and wished the defendants, as experienced dealers in cigars, to undertake this exploitation in the interest of both concerns. The answer states that the same was "to be furnished at the times and in the quantities, sizes, shapes, and qualities as might be thereafter ordered by the defendants, all of the said cigars to be sold and furnished subject to a discount of two per cent. if settled for thirty days from the date of shipment or invoice, such settlement to be made by cash or notes of the said defendants, bearing five per cent. interest and running thirty, sixty or ninety days at the option of the said defendants, and would continue to manufacture, and supply exclusively such 'Optimo' cigars to said defendants, at such prices, on such terms, and in such sizes, shapes, and quantities as ordered by the defendants, in the territory named, and such other territory as might thereafter be given to them, so long as the trade therein would continue." It is further averred that the plaintiff failed and neglected to furnish, as ordered, said Optimo cigars in the sizes, qualities, shapes, and quantities as demanded and as was necessary for the trade in said territory.

The testimony of said Otto F. Lange was to the effect that by request of one Glaspell, traveling salesman representing the plaintiff, they met in Dubuque, Iowa, about the 13th of August, 1900; that Glaspell wanted the defendants to buy from the plaintiff said brand of cigars known as the "Optimo," which he thought the defendants could build up a trade and create a large market therefor. His version of the agreement was as follows:

"The terms were 60 days net, without discount, or 2 per cent. discount if paid in 10 days, but that he would give me 30 days from date of bill in which to take the 2 per cent. discount if I wanted to take it. He said that the goods were made in Tampa, Fla., but that they were shipped from Chicago. If our business grew so that they shipped in case lots from Tampa, that the date of the bill should be the date of the arrival of the goods."

This was followed by some other details as to the mode of settlement. Further on he testified:

"I said to Glaspell I would accept the contract. * * * Glaspell said they would stop others from selling the cigars in the territory given me. He would sell me as many as I desired for my wants, and continue during the life of the brand, as long as I cared to sell them. * * * My orders were to be filled the same day they were received, if they had the goods."

While there are some variances between the versions of the contract in the testimony between said Lange and Glaspell, for the purposes of this case, it is not necessary to rest it upon other testimony than that of Lange.

Orders thereafter were sent in by defendants for cigars as needed in their business, and were generally satisfactorily complied with by the plaintiff. Some complaint in January, 1902, and perhaps later, on the part of the defendants was made that some orders had not been promptly filled; but after explanation by plaintiff the business relations were continued. Shipments of cigars were only made as and when ordered by the defendants. In December, 1902, and the forepart of 1903 the orders were sent in most frequently. On the 7th day of May, 1903, the defendants telegraphed to the plaintiff to "Cancel all our orders." The plaintiff immediately answered by letter as follows:

"Your telegram of to-day is at hand, and in compliance with same we have wired our factory to cancel all of your orders."

And in a postscript said that it (the plaintiff) had received check for \$1,000, which was placed as a credit on the note of \$2,000, due May 2, 1903, and requested the defendants to send check for the balance not later than Monday. The defendants followed up said telegram of May 7th with a letter giving in explanation of the direction to cancel all orders that "we have lost track of what we have ordered." In the letter they requested shipment of certain specific cigars. This letter evidently having been received on the 9th of May, 1903, the plaintiff wrote the defendants that it was very much surprised at the telegram of the 7th of May, "as you canceled all your orders and we wired our factory to that effect." In this letter the plaintiff inclosed the defendants a statement of account, stating that they owed the plaintiff bills amounting to about \$3,500, reminding the defendants of the necessity in its business of having prompt payments made, alleging that in the past they had been quite lenient, that "we find that you seem to take your own time and do your business with us all your own way, leaving us nothing but to ship you goods as fast as you want them, and you pay for them when you get good and ready, and make deductions when you feel like it." Thereafter considerable correspondence took place between the parties respecting the payment of past accounts and notes, resulting in the refusal of the plaintiff to fill any more orders from the defendants until the past arrears were paid, and under a new arrangement. As much of this correspondence ensued after the controversy arose, it contains much of self-serving statements, which are not important to a proper decision of the case.

The controlling question for determination is: Did the defendants have an enforceable contract with the plaintiff? It must be conceded that, if the defendants had such a contract, it was essential to its validity that it should have been mutually obligatory upon both parties. If the defendants could compel the plaintiff to ship cigars, the plaintiff ought to be in a position to compel the defendants to take. Were the defendants under any obligation to send in orders within any particular time, or for any specified quantity or quality

of cigars? The allegations of the counterclaim and the version given of the agreement in the testimony of Otto F. Lange answer these questions. It was entirely at the option of the defendants, dependent upon the conditions of their business and trade, as to whether they would send in any orders at all. From any cause, such as depression in business, or other more desirable arrangements, or a desire to get out of that line of trade, the defendants were at liberty to cease at any time to send orders to the plaintiff, without liability for breach of contract. As shown by the entire dealing between the parties, both unquestionably understood that the plaintiff could only ship cigars as and when ordered by the defendants. So, notwithstanding that prior to the 7th day of May, 1903, the defendants had sent in a large number of orders, which had not then been met by shipments, and although the plaintiff had placed them with the factory at Tampa, both parties acted upon the understanding of the contract, that the plaintiff could not ship save as and when the defendants might direct. It would be a work of supererogation to review the authorities touching the law applicable to such situation, as Judge Sanborn, speaking for this court, in *Cold Blast Transp. Co. v. Kansas City Bolt & Nut Company*, 114 Fed. 77, 52 C. C. A. 25, 29, 57 L. R. A. 696, laid down the following postulates as expressing the correct rule of law:

"The rules applicable to contracts of this class may be thus briefly stated: A contract for the future delivery of personal property is void, for want of consideration and mutuality, if the quantity to be delivered is conditioned by the will, wish, or want of one of the parties; but it may be sustained if the quantity is ascertainable otherwise with reasonable certainty. An accepted offer to furnish or deliver such articles of personal property as shall be needed, required, or consumed by the established business of the acceptor during a limited time is binding, and may be enforced, because it contains the implied agreement of the acceptor to purchase all the articles that shall be required in conducting his business during this time from the party who makes the offer. *Wells v. Alexandre*, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218; *Minnesota Lumber Co. v. Whitebreast Coal Co.*, 43 N. E. 774, 160 Ill. 85, 31 L. R. A. 529; *Parker v. Pettit*, 43 N. J. Law. 512. But an accepted offer to sell or deliver articles at specified prices during a limited time in such amounts or quantities as the acceptor may want or desire in his business, or without any statement of the amount or quantity, is without consideration and void, because the acceptor is not bound to want, desire, or take any of the articles mentioned. *Bailey v. Austrian*, 19 Minn. 535 (Gil. 465); *Tarbox v. Gotzian*, 20 Minn. 139 (Gil. 122); *Railway Co. v. Bagley*, 60 Kan. 424, 433, 56 Pac. 759; *Oil Co. v. Kirk*, 15 C. C. A. 540, 68 Fed. 791; *Crane v. C. Crane & Co.*, 45 C. C. A. 96, 105 Fed. 869. Accepted orders for goods under such void contracts constitute sales of the goods thus ordered at the prices named in the contracts, but they do not validate the agreements as to articles which the one refuses to purchase, or the other refuses to sell or deliver, under the void contracts, because neither party is bound to take or deliver any amount or quantity of these articles thereunder. *Crane v. C. Crane & Co.*, 45 C. C. A. 96, 105 Fed. 869; *Oil Co. v. Kirk*, 15 C. C. A. 540, 68 Fed. 791; *Campbell v. Lambert*, 36 La. Ann. 35, 51 Am. Rep. 1; *Railway Co. v. Mitchell*, 38 Tex. 85, 95; *Ashcroft v. Butterworth*, 136 Mass. 511, 514; *Drake v. Vorse*, 52 Iowa, 417, 3 N. W. 465; *Thayer v. Burchard*, 99 Mass. 508, 520; *Hoffman v. Maffioli*, 80 N. W. 1032, 1035, 104 Wis. 630, 47 L. R. A. 427; *Railroad Co. v. Jones*, 53 Ill. App. 431, 437; *Rafolovitz v. Tobacco Co.* (Sup.) 25 N. Y. Supp. 1036, 73 Hun, 87."

The case at bar does not come within the rule in respect of a contract obligating the vendor to furnish all the goods required by

the vendee in an established business during a limited time, as in the case of a merchant who contracts with a manufacturer to furnish all the goods of a particular quality the acceptor requires, with the implication that he binds himself to take during a specified period all the articles required for the given business; or as in the case of a contractor who has accepted a proposition from a manufacturer or vendor to furnish all the material required in the construction of a particular work. But this case comes clearly within the rule that an accepted offer to sell or deliver, or to buy at specified prices, during a limited time, in such quantities as the buyer may need or desire in his business, without any specification as to the quantity or amount, is without consideration, for the palpable reason that the buyer placed himself under no obligation to need or desire any quantity at any given time or during any given period. The defendants were at liberty to send in orders *ad libitum*, or not to send in any orders at all. The one was completely left at the will or caprice of the other. The plaintiff could at no time manufacture any quantity or quality of cigars depending upon a contract requiring the defendants within a given period to take them, as it was wholly at the pleasure of defendants in sending in any orders.

The case of *Bailey et al. v. Austrian*, 19 Minn. 535 (Gil. 465), appositely presents the law of this case. The facts sought to be established there were that on a given date the plaintiffs, being engaged in a general foundry business at St. Paul, the defendant promised to supply them with all the Lake Superior pig iron wanted by them in their said business until December thereafter, at specified prices, and the defendant claimed that the plaintiffs promised to purchase of defendant all of said iron which they might want in their business during the time above mentioned. After stating the general rule laid down in 1 *Parsons on Contracts*, 449, and note Z, the court said:

"Upon the foregoing state of facts, the engagement of plaintiffs was to purchase all of said pig iron which they might want in their said business during the time specified; but they do not engage to want any quantity whatever. They do not even engage to continue their business. If they see fit to discontinue it on the very day on which the supposed agreement is entered into, they are at entire liberty to do so at their own option, and, whatever might have been defendant's expectation, he is without remedy. In other words, there is no absolute engagement on plaintiffs' part to 'want,' and, of course, no absolute engagement to purchase any iron of defendant. Without such absolute engagement on plaintiffs' part, there is no absolute mutuality of engagement, so that defendant has the right at once to hold plaintiffs to a positive agreement."

The contract described by the defendants is not enforceable against the plaintiff, as it is wanting in the essential of mutuality. The request by plaintiff for an instructed verdict should have been given.

It is finally urged, however, against an instructed verdict that it was properly refused because it appears from the counterclaim that the plaintiff owed the defendants some \$22.10 for advertising, expressage, and a cigar sign. There was no issue made by the plaintiff at the trial concerning these small items; and in entering judgment for the plaintiff on the note and account it would be but a matter of computation of the amount due thereon after deducting the undis-

puted item of \$22.10, which the court should have directed as a mere clerical act, and entered judgment for the plaintiff for the balance due on the note and account.

It results that the judgment of the circuit court must be reversed, and the cause remanded, with directions to proceed in conformity with this opinion.

On Petition for Rehearing.

The petition for rehearing assumes that the opinion of the court, holding that the contract on which the counterclaim is predicated is not enforceable for want of mutuality, should be withdrawn for the reason that such question does not properly arise on the record, and was not, therefore, argued by counsel for the defendant in error. This criticism is not well founded, either in fact or law. At the close of all the evidence the plaintiff in error moved the court for an instructed verdict in its favor. Among the grounds stated in support of the motion is the following:

"Because the plaintiff [i. e., the proponent of the counterclaim] has affirmatively shown a failure of consideration on the part of the defendant for the contract sued upon."

"Plaintiff in error assigns as error the action of the court in overruling the motion made by plaintiff in error at close of all the evidence in the case that the jury be instructed to find a verdict in its favor."

In the closing paragraph of the brief of the plaintiff in error it is urged that:

"In our judgment the whole case was determinable upon the motion to direct the verdict. Because that motion was overruled and the court by its instructions determined as a matter of law in its interpretation of the contract that defendant in error might recover damages on its counterclaim, we confidently believe the question involved in this case should finally be determined in this court, and the judgment of the court below reversed."

The lack of mutuality in the reciprocal obligations of the alleged contractors negatives the existence of a valid consideration for the promise of one of the parties. Forsooth counsel for the plaintiff in error may have laid especial stress in his argument upon some proposition of law which he conceived to be important and controlling did not warrant the court in disregarding other errors reasonably within the terms of an exception or an assignment of errors.

That counsel does not fully recognize and urge a principle of law in argument which is embraced within the pleadings or presented in the record cannot preclude the court from giving due consideration and application to a rule of law which is determinative of the controversy. Indeed, an appellate court would fail to heed the wholesome maxim, "*Interest reipublicæ ut sit finis litium*," should it fail to take notice, when reasonably presented, of a settled principle of law the application of which ends the litigation. Rule 11 of this court (150 Fed. xxvii), respecting the assignment of errors, declares that "the court, at its option, may notice plain errors not assigned." This proviso was and is intended, in the interest of justice, to reserve to the appellate court the right, resting in public duty, to take cognizance of palpable error on the face of the record and proceedings, especially such as clearly demonstrate that the suitor has no cause of action. "Where parties

have produced all their evidence, and the court has received it, and they have rested their case at the trial, they have thereby admitted, and in that way estopped themselves from denying, that they can do no more to overcome the objection that the evidence is insufficient to sustain a verdict in their favor, because the question of the sufficiency of the evidence always arises before the submission to the jury, and it is the province and duty of the court to determine it." *Bank of Havlock v. Western Union Telegraph Co.*, 141 Fed. 522-527, 72 C. C. A. 580, 4 L. R. A. (N. S.) 181.

In support of the motion for rehearing counsel have extensively gone into a review of the case in the attempt to show that the opinion of the court improperly held that the contract in question was unilateral, placing much stress upon the contention that the testimony of Mr. Lange tended to show that a part of his undertaking under the arrangement between the parties was that he should, by his experience and labor, extend the field for the sale of the cigars to be furnished by the plaintiff in error, thereby creating a larger market for them, and that he performed in this respect his undertaking. Let it be so conceded. But how does this obviate the stubborn fact that whether or not he would maintain that field and demand, occupy or abandon it, or cease, ad libitum, to send in any orders, or betake himself to some other field of operation and employment, were wholly optional on the part of the defendant in error? The plaintiff in error, on such election by its purchaser, was without remedy. It could not compel the proposed purchaser to want any cigars. It could not ship a box of cigars, except as ordered by the purchaser. As shown in the opinion, both parties so recognized the situation and acted upon it when the defendant in error directed that the orders already in be not filled. That such a contract is one-sided, wanting in that mutuality essential to its enforcement, is settled in this jurisdiction.

The petition for rehearing is denied.

(155 Fed. 725.)

CITY OF LOUISVILLE v. CUMBERLAND TELEPHONE & TELEGRAPH CO.

(Circuit Court of Appeals, Sixth Circuit. July 24, 1907.)

No. 1,657.

1. COURTS—JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.

When the jurisdiction of a federal court depends upon the case being one arising under the Constitution or laws of the United States, the facts necessary to make such a case must be plainly shown upon the record, and it is not enough that such question may arise.

[Ed. Note.—Jurisdiction in cases involving federal questions, see notes to *Bailey v. Mosher*, 11 C. C. A. 308; *Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, 35 C. C. A. 7.]

2. CONSTITUTIONAL LAW—IMPAIRMENT OF CONTRACTS—UNAUTHORIZED ACTION BY MUNICIPALITY.

A federal court is without jurisdiction of a suit to enjoin the enforcement of a municipal ordinance, on the ground that it impairs the obligation of a contract or deprives complainant of property without due process of law, in violation of the Constitution of the United States, when the bill

alleges that no power had been granted to the municipality by the Constitution or Legislature of the state to pass such ordinance; the prohibition of the federal constitution being against state action only.

Appeal from the Circuit Court of the United States for the Western District of Kentucky.

The following is the opinion of Evans, District Judge, of the Circuit Court:

This case has been argued upon defendant's demurrer to the bill of complaint and upon complainant's motion for a temporary injunction, and it is important at the threshold to ascertain what is the real scope of the bill, for, when we have done that, the questions raised at the argument will require little discussion. A careful consideration of it has led me to the conclusion that the bill, after showing the nature and extent of complainant's business in Louisville and the rights it claims under its articles of incorporation, in substance and effect avers that defendant has enacted a certain ordinance whereby it undertook to fix the maximum rates which complainant might charge its patrons in the city; that the city had no lawful power to fix other than reasonable rates; that the rates fixed by the ordinance were unreasonably low; that the enforcement of the ordinance would, for that reason, practically confiscate the plaintiff's property; and that thus it would be deprived thereof by the city without due process of law, and in violation of the fourteenth amendment to the Constitution of the United States. This is the fundamental ground for the relief asked, whatever argumentative details may be urged in the pleading.

1. The judiciary act gives the Circuit Courts jurisdiction of actions which arise under the Constitution or laws of the United States, and it is obvious that the relief sought in this instance is based upon a claim made under the Constitution of the United States. There could scarcely be found a plain, adequate, and complete remedy at law against the city. Indeed, it is difficult to conceive of any form of action at law which would be available to the complainant for remedying the alleged wrong it complains of. There does not therefore seem to be any reasonable doubt either of the jurisdiction of the court or of the proposition that, if the averments of the bill be true, it states a ground for equitable relief. The cases of *Chicago, etc., Ry. Co. v. Minnesota*, 134 U. S. 458, 10 Sup. Ct. 462, 33 L. Ed. 970, *Reagan v. Trust Co.*, 154 U. S. 399, 14 Sup. Ct. 1047, 38 L. Ed. 1014, *Railway Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567, *Covington, etc., Co. v. Sandford*, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560, and *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, seem to leave no room for doubt upon either of the two propositions just indicated. Neither of those propositions, however, could be maintained if the sole claim made by the bill was that the Constitution and laws of Kentucky did not give the defendant the power to pass the ordinance complained of. If that were all, no question would arise under the Constitution or laws of the United States, and the action would not be based upon any federal question. *Mayor, etc., v. Holst*, 132 Fed. 901, 65 C. C. A. 449; *New Orleans v. Benjamin*, 153 U. S. 424, 14 Sup. Ct. 905, 38 L. Ed. 764; *Hamilton Gas, etc., Co. v. Hamilton City*, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963. But we think the bill, fairly considered, does not admit of that construction. It is clearly founded upon the claim that the rates fixed would deprive the complainant of the benefits of its property and turn those benefits over to others, thus confiscating it without due process of law, and thus basing complainant's right of action upon the Constitution of the United States, and not upon the law or the Constitution of Kentucky.

But it is insisted that, as the bill avers that the ordinance is void because the city council had no legislative or constitutional power to enact the ordinance, no cause of action is stated, and authorities are referred to, among them the opinion of Judge Grosscup in *People, etc., Co. v. City of Chicago* (C. C.) 114 Fed. 388. If the averments referred to were the entire claim of the complainant, there might be some force in the contention; but it is by no means all. As already indicated, the fundamental claim is that the city cannot confiscate the complainant's property by taking the benefits thereof from the

complainant without due process of law; that the city can only fix reasonable rates under the contract between it and complainant; and that without authority it has passed the ordinance which is claimed to be void. The mere fact that the ordinance is void or invalid or unauthorized would be no ground for denying the relief. On the contrary, it is because the ordinance is asserted to be invalid and to be violative of the federal Constitution that the relief prayed for is asked. If the order be valid and authorized, then the city had the right to enact it, and that would end the matter. In the case last referred to Judge Grosscup said: "My jurisdiction of the case does not extend to that question [namely, the interpretation of the state statutes], unless its decision one way or the other is a necessary predicate of the constitutional question involved." In that case it was not such a necessary predicate, but here it is, because the very question to be determined is whether the passing and enforcing of the ordinance would deprive the complainant of a constitutional right. The cases of *Hamilton Gas, etc., Co. v. City of Hamilton*, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963, and *Savannah, Thunderbolt, etc., Ry. v. Savannah*, 198 U. S. 392, 25 Sup. Ct. 690, 49 L. Ed. 1097, especially the former are much in point upon the jurisdictional question.

Assuming the averments of the bill to be true, a case for equitable relief is shown, and the demurrer will be overruled.

2. We come now to the motion for a temporary injunction pendente lite. A case like this usually cannot be determined upon demurrer, for the court would hardly feel authorized to conclude at that stage that the rates are in fact unreasonable and confiscatory. All that it will now decide is that, as the sworn averments of the bill stand undenied, they should be regarded, for the purposes of the motion, as *prima facie* true. This being so, it is a fair exercise of discretion to preserve the present status by enjoining the enforcement of the ordinance until the issue can be made up and steps taken fully to ascertain all the facts that should have a bearing upon the matter to be determined. The propriety of such a course will become apparent when we consider the rule which should govern such cases. That rule, we think, is fairly and very accurately stated in the recent work on the Law of Railroad Rate Regulation by Nagel, section 312 of which is as follows:

"The reasonableness of the schedule as a whole depends as has been seen, upon whether it yields a fair return to the carrier. This is largely a mathematical question. The carrier is entitled, first, to pay all expenses, which would include both the actual expenses of operation and also certain annual charges that must be paid before any real profit can be realized. He is entitled furthermore to gain a fair profit on his capital invested. The determination of the actual amount of the capital invested may be a matter of some difficulty. Once determined, the rate of profit upon that amount of capital is a question which will be determined, generally speaking, by the ordinary business profit of the time and place. A schedule of rates will be reasonable from the point of view of the carrier if it yields him a net profit equal to that which would be realized, as a business question, from any other business where the capital and the risk were the same."

True, in terms, this relates to carriers, but there can be no difference in the applicable principle. This rule must guide us in the further progress of the case, and it will demand a very full investigation of all the facts.

It was insisted at the argument with great earnestness that the bill only covers an attempt to enjoin prosecutions for crimes, and authorities were read in that connection. Upon the general proposition, of course, there can be no doubt so far as federal jurisprudence is concerned. *Flitts v. McGhee*, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535, was most relied upon; but, while it states the general doctrine, a careful reading of the opinion will show that it was based solely upon the ground that the suit was substantially an action against the state of Alabama, and for that reason could not be maintained. The other provisions in the judgment directed were incidental to the main proposition. There was nothing said in that case in conflict with the doctrines laid down in the opinion in the cases to which we first referred, and all of which were referred to in *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819. Another case cited was *Camden, etc., Co. v. Catlettsburg* (C. C.) 129 Fed. 422; but the second of the syllabi to it correctly shows that

the distinction there taken was that, while you might not enjoin prosecutions already begun, there was no difficulty about enjoining certain forms of effort to begin prosecutions in cases like this. While a criminal action already begun may not be enjoined, yet if the city of Louisville, its officers, employes, agents, or others, should seek to enforce an ordinance held, *prima facie*, to be void, we see no reason why all of them or any of them may not be enjoined from attempting to do so by instituting prosecutions for its enforcement, especially where there are as many as 10,500 patrons, as it appears there are here, and where as to each one of them a prosecution might possibly be begun, thus making it most oppressive. This phase of the matter was discussed in *L. & N. R. R. Co. v. McChord* (C. C.) 103 Fed. 226.

It is also urged that, as the ordinance has actually been passed, no remedy is available to the complainant as against the city. The action of the city in the premises could not be enjoined before it was complete. In the precisely analogous case of *McChord v. L. & N. R. R.*, 183 U. S. 483, 22 Sup. Ct. 165, 46 L. Ed. 289, the Supreme Court held that merely threatening to fix rates could not be enjoined, but that parties must wait until rates are fixed, and then apply for an injunction against carrying the schedules into effect, if they wished to test the question. It would be most remarkable if the city could pass a void and oppressive ordinance, and then lie back and say: "We have acted. Make the most of it. We are out of reach." The very measure which the city enacted is the thing the complainant seeks to invalidate. The action of the city alone gave that measure vitality and force. Its power alone can enforce it. In order to prevent its enforcement the city must be reached. So that, we think for the present the city, its officers, agents, employes, and all other persons who may have knowledge of the injunction, should be restrained, and all such may become amenable to the process of the court if they attempt to enforce the ordinance until the question of its validity is finally passed upon. All the injunction can do is to preserve the present status. It is by no means a final determination of the questions involved.

We see no reason why a temporary injunction *pendente lite* in the form indicated should not be granted, and the motion therefor is sustained.

A. E. Richards and A. B. Bensinger, for appellant.

Wm. L. Granbery and D. W. Fairleigh, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. This is a bill filed in the Circuit Court to restrain the enforcement of a municipal ordinance regulating charges for telephone service in the city of Louisville, on the ground that the ordinance was violative of the obligation of a contract between the complainant and the city, and also on the ground that the rates prescribed were unreasonable, unjust, and confiscatory, and, if enforced, would deprive complainants of their property without compensation and without that due process of law guaranteed by the fourteenth amendment. An injunction *pendente lite* was allowed upon the averments of the bill, and from this order the city of Louisville has appealed under the seventh section of the Court of Appeals act, as amended by Act April 14, 1906, c. 1627, 34 Stat. 116. The propriety of the preliminary injunction must turn here upon the question of the jurisdiction of the Circuit Court. There was no jurisdiction by reason of diversity of citizenship; the complainant being a business corporation created under the laws of Kentucky, and the defendant a municipal corporation of the same state. Jurisdiction was invoked upon the contention that this is a suit arising under the Constitution or laws of the United States. That the bill does aver that the ordinance impairs the obligation of a contract and is also an attempt

to deprive complainant of its property without due process of law is plain enough. But the constitutional prohibitions which are invoked run against the state, and the state alone, while the bill of the complainant in plain words negatives state action by averring that "no power to regulate the rates charged by your orator or other telephone companies" has been granted "by the Constitution or the Legislature of the state of Kentucky, or in any other way," and that the enactment of said ordinance was and is beyond the power of the common council of said city, and the said "ordinance void and an assumption of power and authority upon the part of the said common council unwarranted and unfounded."

If this be true, there was no state authority behind the action of the Louisville common council, and no ground to claim that constitutional prohibitions have been violated which are pointed at state aggression only. A municipal ordinance may be the exercise of a delegated legislative power conferred upon it as one of the political subdivisions of the state; but, to be given the effect and force of a law of the state, it must have been enacted in the exercise of some legislative power conferred by the state in the premises. *Murray v. Charleston*, 96 U. S. 432, 440, 24 L. Ed. 760; *New Orleans Water Works v. La. Sugar Co.*, 125 U. S. 18, 31, 8 Sup. Ct. 741, 31 L. Ed. 607; *Hamilton Gaslight Co. v. Hamilton*, 146 U. S. 258, 266, 13 Sup. Ct. 90, 36 L. Ed. 963; *Iron Mountain R. R. Co. v. Memphis*, 96 Fed. 113, 126, 37 C. C. A. 410; *St. Paul Gas Co. v. St. Paul*, 181 U. S. 142, 148, 21 Sup. Ct. 575, 45 L. Ed. 788; *Barney v. City of New York*, 193 U. S. 430, 24 Sup. Ct. 502, 48 L. Ed. 737; *Manhattan Railway v. City of New York* (C. C.) 18 Fed. 195; *Kiernan v. Multnomah County* (C. C.) 95 Fed. 849; and *Savannah, etc., Ry. Co. v. Savannah*, 198 U. S. 392, 25 Sup. Ct. 690, 49 L. Ed. 1097.

In *Hamilton Gaslight Co. v. Hamilton*, cited above, Justice Harlan said:

"A municipal ordinance, not passed under supposed legislative authority, cannot be regarded as a law of the state within the meaning of the constitutional prohibition against state laws impairing the obligations of contracts. *Murray v. Charleston*, 96 U. S. 432, 440, 24 L. Ed. 760; *Williams v. Bruffy*, 96 U. S. 176, 183, 24 L. Ed. 716; *Lehigh Water Co. v. Easton*, 121 U. S. 388, 392, 7 Sup. Ct. 916, 30 L. Ed. 1059; *N. O. Waterworks v. Louisiana Sugar Co.*, 125 U. S. 18, 31, 38, 8 Sup. Ct. 741, 31 L. Ed. 607. A suit to prevent the enforcement of such an ordinance would not therefore be one arising under the Constitution of the United States."

If the state has conferred authority upon the municipality to establish and enforce reasonable rates for telephone service, then the establishment of rates under this power would be the establishment of rates by the state itself. *Reagan v. Farmer's Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014. But this is just what the bill charges has not been done, thereby depriving the Circuit Court of every foundation for its jurisdiction as a suit arising under the Constitution or laws of the United States. Counsel now say that the averment that no power has been delegated by the state to the city of Louisville to regulate the rates to be charged for telephone service to

be rendered in the city is a mistaken averment of law, and should be ignored in consequence of a prior statement of the bill, in which it is said that "the common council of the city of Louisville assumed and claimed to have been given the authority by the Legislature of the commonwealth of Kentucky, to regulate the charges and rates to be charged by telephone companies," and had upon such assumption passed the ordinance complained of. Counsel says this shows that the city council acted under color of authority and should save the jurisdiction. But these averments are not inconsistent, and do not bring the case within *Savannah, etc., Ry. Co. v. Savannah*, cited above, where there were inconsistent and contradictory averments as to the authority for the tax assessment in question. That the common council "assumed" and "claimed" to have the power to do what it did do is self-evident. The enactment of the ordinance is in itself, and from any point of view, an assumption and claim of right to do what it did. This averment is therefore far from an averment that the common council was exercising a power of regulation conferred by the state. To make it clear that it had no general regulating power over such companies, and that it was acting outside of any such delegated regulating power, the clause relied upon now as asserting that the city council did act by authority of the state was followed by the distinct averment, above referred to, that the council acted wholly without any authority from the state. This makes an issue under the law of the state. If the fact be that no provision of the state Constitution, or of state law, or of the municipal charter, delegates the state power in respect to the regulation of the charges of telephone companies rendering services within the city of Louisville, the ordinance is void as *ultra vires*, and its enactment did not violate any prohibition of the Constitution of the United States, because not enacted in pursuance of any state authority.

When jurisdiction depends upon the case being one arising under the Constitution or laws of the United States, the facts necessary to make such a case must be plainly shown upon the record, and it is not enough that such question may or may not arise. *New Orleans v. Benjamin*, 153 U. S. 411, 14 Sup. Ct. 905, 38 L. Ed. 764; *McCain v. Des Moines*, 174 U. S. 168, 181, 19 Sup. Ct. 644, 43 L. Ed. 936; *Western Union Tel. Co. v. Ann Arbor R. R. Co.*, 178 U. S. 239, 244, 20 Sup. Ct. 867, 44 L. Ed. 1052; *Manhattan R. R. Co. v. City of New York (C. C.)* 18 Fed. 195; *Levy v. Shreveport (C. C.)* 28 Fed. 209.

The most that can be made of the averments of this bill is that it presents questions arising under the Constitution and laws of the state. The remedy in such cases is in the courts of the state. If it shall turn out that the common council did have general power to regulate the charges of telephone companies rendering services within the city of Louisville, and that it has illegally exercised that power, either because it has thereby impaired the obligation of a contract, or by imposing rates which are unjust and confiscatory, a federal question may arise. But it is not enough to found jurisdiction upon that such a question may arise when the bill expressly avers that the action of the common council is not imputable to the state by charging that no such power had been delegated by the state.

The conclusion is that the court below erred in allowing an injunction, because it was without jurisdiction to entertain the bill at all.

Remanded, with direction to dissolve the injunction and dismiss the bill.

(155 Fed. 731.)

AMERICAN LAVA CO. et al. v. STEWARD et al.

(Circuit Court of Appeals, Sixth Circuit. July 24, 1907.)

No. 1,642.

1. PATENTS—VALIDITY—SUFFICIENCY OF DESCRIPTION.

Where the essence of an invention is the location, form, size, or any other characteristic of the means employed, the patentee must distinctly specify the peculiarities in which his invention is to be found.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 133-143.]

2. SAME—AMENDMENT OF APPLICATION.

An amendment to an application for a patent made to introduce a new theory of the invention, and which contains new claims covering a process based on such theory, neither of which were mentioned in the original application, if permissible as within the invention, should be verified by the oath of the inventor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 152.]

Amendment of application, see note to *Cleveland Foundry Co. v. Detroit Vapor Stove Co.*, 68 C. C. A. 239.]

3. SAME—MECHANICAL AND PROCESS CLAIMS.

While it is competent, when the circumstances permit it, for an inventor in describing a machine or apparatus which he has devised to make a claim for a process which his patented device is capable of carrying out, to entitle him to do so, the process must be one capable of being carried out by other means, otherwise the claim is merely for a function of the machine; and, unless such other means are known or are within the reach of ordinary skill or judgment, the patentee is bound to point them out.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 141.]

4. SAME—ANTICIPATION—ACETYLENE GAS BURNERS.

The Dolan patent, No. 589,342, for an acetylene gas burner, and the process embodied therein, claims 1, 2, and 3 are void (1) for anticipation, especially by the French patent to Bullier of April 20, 1895; and, additions thereto (2), for indefiniteness of description; and (3) because they were new claims based on a new theory of the principle of the invention added by an amendment to the application made in the Patent Office which was not verified.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

Charles Neave, for appellants.

Louis C. Reagener, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This appeal brings before us the questions of the validity and of the infringement of letters patent No. 589,342, granted to E. J. Dolan August 31, 1897, for improvements in

tips for acetylene gas burners, on an application filed February 18, 1897, which patent the complainants, the appellees here, claim to own by assignment. The claims of the patent here involved are those numbered 1, 2, and 3. There are two others, numbered 4 and 5. The first and second claims are for the process of "burning acetylene gas." The third is for the apparatus employed. The defenses were that these claims were invalid because of anticipation of the invention, and that the defendant did not infringe. The court below, while admitting the case to be "close," decreed in favor of the complainants. The doubt seems to have been upon the validity of the patent in respect to the claims involved. The appellant rests its contention that the claims are invalid upon several grounds. It will be convenient to consider first the third claim, which is for the burner, and then the other two, which relate to the process. In the specification the patentee, reciting that a difficulty had been experienced in burning acetylene and other gases rich in carbon from the accumulation of deposits at the orifice of the burner whereby the passage was clogged and the flame distorted, proceeds to state that he proposes the use of two independent gas jets, mounted and inclined toward each other, so that the jets of gas with the air which has been drawn into the gas tubes through openings in the sides thereof, by the swift upward movement of the gas, shall be made to clash together at the point of combustion, and produce a broad, flat flame. The structure of the members of the burner which he proposes to use so mounted and inclined can be best explained by reproducing figure 1, which is a central longitudinal section thereof and figure 2, which is a modification.

FIG. 1.

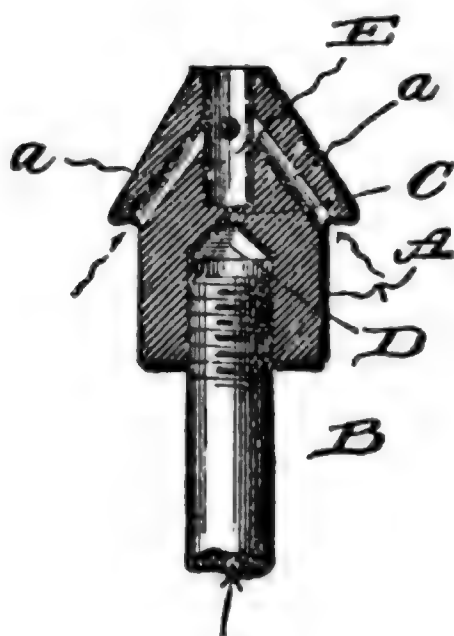
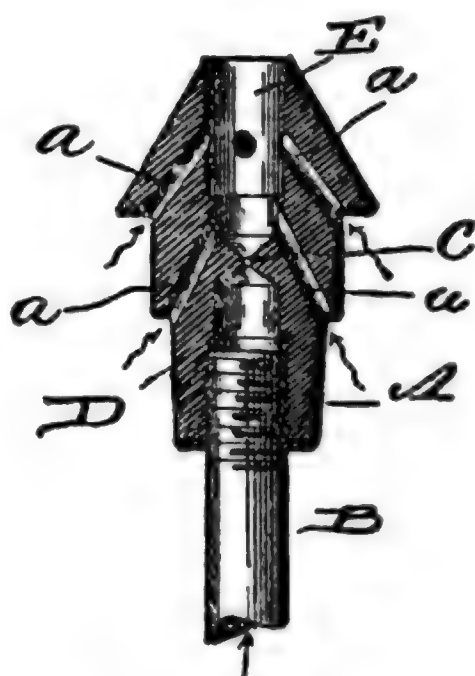


FIG. 2



A is the body of the "tip," or burner, secured to the gaspipe, B. C is a constriction of the passageway for the gas leading from the chamber, D, into the chamber, E, at the upper end of which is the ex-

tremity of the tip. This constriction, C, is located at or near the longitudinal center of the burner. The letters, a a, represent inclined air ducts leading from the open into the gas chamber, E. We shall have occasion to refer to some further particulars of the specifications later on. Of this construction he says:

"The operation of this device seems to be that the gas under pressure escaping in a cylindrical jet through the opening, C, draws in on all sides an envelope of air through the opening, a. This is due to the fact that the chamber, E, is larger than the outlet, C, and to the fact that the air inlets, a a, substantially surround the issuing gas-jet. The result of this arrangement seems to be to so cool the outside of the flame as to prevent any deposit of carbon at the point of egress."

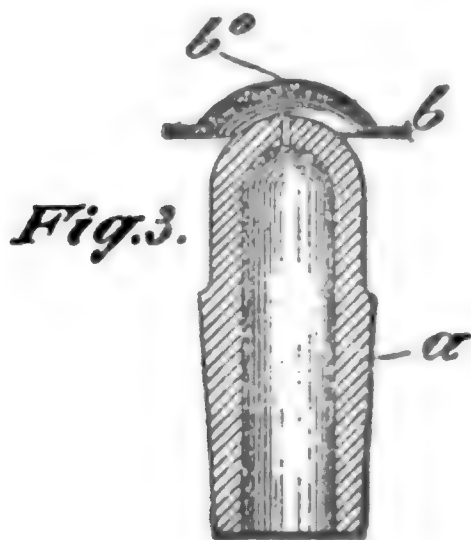
The third claim is this:

"3. The combination in an acetylene-burner of the block, A, having the minute opening, C, the cylindrical opening, E, opening without obstruction to the atmosphere, and the air-passages a, substantially as described."

The grounds on which it is insisted that the patent is void in respect of this claim are, first, that it was anticipated by prior patents; second, that the description is too indefinite to distinguish it from the prior art; and, third, that the specifications were altered in essential particulars by amendment while the application was pending in the office, so as to bring in entirely new matter which is now relied on, and that the new matter was not verified by the oath of the applicant. We think that these objections are well taken. In respect to the first, the proof makes it clear that for some time prior to Dolan's supposed invention several acetylene gas burners had been invented and patented, some in this country, and some abroad, which contained the substance of all that Dolan described in his patent. By this we do not mean to say that the theory which he puts forward in respect to the mode of operation of the means he suggests had been definitely stated, but that burners had been devised and patented which embodied the means described by him, and that they were adapted to accomplish the same result. The French patent to Bullier of April 20, 1895, and his first and second certificates of addition, dated June 29, 1895, and June 12, 1896, respectively, furnish the most complete anticipation; but, before referring to the invention there disclosed, we will notice some other patents, to find what ideas and forms had been suggested by them for the construction of gas burners. A common and well-known type of such burners was the Bunsen burner, which consisted of a cylindrical chamber into which the gas was pressed through a small aperture at the bottom in a fine jet. Small openings were made in the sides of the cylinder through which air was drawn by the upward rush of the gas through the cylinder to supply the oxygen required for combustion. The theory of this operation was that the gas and air were commingled before reaching the place of combustion at the upper end of the chamber. Duplex burners—that is, burners in which two streams of gas and air combined are made to impinge upon one another at the place of combustion—were also old. In a French patent granted to M. Letang in 1896, for

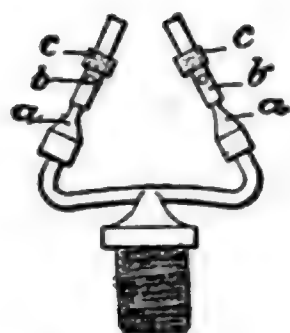
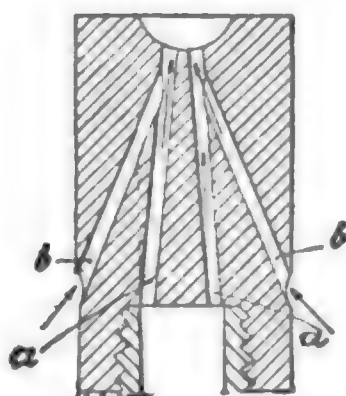
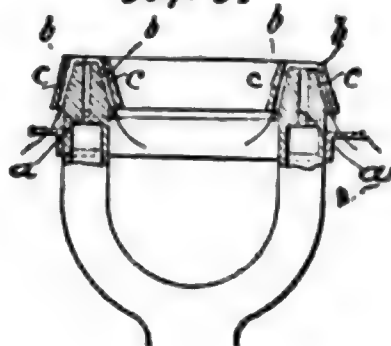
a burner of acetylene gas for lighting, the inventor states his purpose to provide means for preventing the heating of the outlet and its clogging by deposits resulting therefrom. One of the means by which he proposed to do this was to cool the gas outlets by means of a current of air introduced through a circular slot in the chamber above the constricted tube from which the gas jet ascends to the upper orifice. Dolan says he does this to "cool the outside of the flame." Letang, with apparently more correctness, says he thereby "cools the gas outlet opening." We pause here to note that if the tendency of the circular column of gas when drawing in air upon its surface is to encircle itself in an envelope of air, and that they pass out of the burner in that relation, as is contended in behalf of the Dolan patent, it would seem as though Letang's device was adapted to perform that function. If his chamber was long, the columns of gas and air would not preserve their integrity of shape so well, but it would be a difference in degree only, and could be improved by making the chamber shorter, or locating the air slot nearer the orifice. This is a subject to be referred to later.

A patent to Bullwiller was granted by the United States on April 19, 1898, on an application filed January 25, 1897, for "improvements in burners for acetylene gas," which had been patented in Switzerland November 28, 1896. This invention was intended for the same purpose; that is, to obviate the formation of deposits about the orifice of the burner. His plan was to locate what he calls a "hood" above the orifice of the body of the burner, with an opening through it above the orifice of the body of the burner, and yet so near it that the jet of gas would go through it without interruption, and the air would be taken in through the circular opening between the top of the body of the burner and the hood, and the combustion take place on the outer surface of the hood. In this way the air would form an envelope for the gas jet, if Dolan's theory is correct, by the same mode of operation. In order to fulfill the theory of Dolan's patent, his air ducts should be close to the orifice over which combustion takes place. But Bullwiller's hood is integral with the body of the burner, and is essentially a part of it. The whole is properly styled a burner and the improvement is of a "burner." The principle or mode of operation of it seems to be the same as Dolan's if the theory of Dolan's patent is well founded. Figure 3 shows one of his forms.



Bullier's patent of 1895 and his additions of that and the following year were for "a species of tip for lighting by acetylene and other gases rich in carbon." It is well to note that in Dolan's and Bullier's patents, as well as in other patents, the words "tip" and "burner" are used to designate the same thing, and

not the orifice thereof. Figures 3 and 5 of Bullier's original patent and Figure 1 of his addition of June 12, 1896, are here shown.

Fig. 1*Fig. 3.**Fig. 5.*

In all of the figures *a a* are the channels for the gas jets, and *b b* the air ducts. In figure 1 of the addition, at a point between *a* and *b*, the constriction of the pipe leading into the chamber is shown as in Dolan's and in other burners. In his original patent he says:

"This invention relates to a species of tip made up of one or more central conduits for the supply of the gas and of lateral conduits which form air flues, in such manner as to bring about the complete combustion of gases rich in carbon, and notably, acetylene. * * * For definiteness, I have represented, in Figs. 1 to 4 of the drawing, a tip called the Manchester tip, having two orifices *a* for the exit of the gas and giving a flat flame. Into these orifices open two or a greater number of air conduits, *b*, formed obliquely with respect to the axis of the tip, in such manner that the current of gas draws in a certain quantity of air which, mixing with the gas, determines the complete combustion of this gas, at the same time augmenting considerably its illuminating power."

Then, to apply his system to Argand burners he says:

"In the application of this system to a tip having a circular slot giving a cylindrical flame, I arrange around the tip a circular ring *c* as shown in Figs. 5 and 6 of the drawing. This ring, of any suitable material, is mounted in any suitable manner provided that it leaves between it and the tip, for the passage of air, two spaces *b* concentric to the gas escape slot *a*; instead of having two slots *b* which form the spaces of which I have just spoken, I could also arrange series of holes which would subserve the same function."

And he says that his air channels are inclined "so that the current of gas draws in the air." And, as may have been noticed, he says these conduits for air opening into the gas duct may be "two or a greater number." Referring to figures 3 and 5, it is seen that in the former the air comes into the gas duct very near the orifice of the burner, and in figure 5 that the air is drawn in, in a circular form around the column of gas just below the edge of the orifice, and thus (if, as we said before, the valuable feature of Dolan's burner consists in its protecting the orifice from deposits) it is as complete an anticipation of Dolan's device as it is possible to imagine. But Bullier adds that, instead of the circular slots, he "could also arrange

series of holes which would subserve the same function"—that is, a series of air ducts leading from the outside into the gas jet—and thus equipped the burner would be a fac simile of Dolan's; for, although he does not state precisely where in the length of the burner he would put the holes, so neither does Dolan. Bullier states that he inclines the air ducts toward the gas channel, a device apparently to facilitate the draft of air. In the specifications of Dolan's patent he uses the same form of construction. It seems manifest that Bullier might have formulated the third claim of Dolan's patent upon his (Bullier's) description of his own invention, if the French law had required the claims to be formulated. The complainants recognize this in France, for there they manufacture and sell these same burners under a license obtained from the owners of the Bullier patent.

This leads us to the second ground of objection which the appellant urges against the validity of the Dolan patent, which is the lack of definite specifications. The third claim which we are now considering is a combination of the body of the burner, the constricted opening C, the chamber, E, and the air passages, but it makes no requirement in respect of the longitudinal location of the air ducts on the chamber. Nor do the specifications help out the uncertainty. They only require that the air passages shall lead into the chamber above the constriction of the channel. If his had been the first of such burners, perhaps this would have been sufficient, provided the letting in the air near the bottom of the chamber would have answered his purpose. But in the then state of the art he was bound to differentiate his structure from those which preceded him; and especially is this so where the whole merit of his invention depends upon some peculiarity in the elements he employs. We think it may be affirmed as a rule resting upon the fundamental principles of patent law that, where the essence of the invention is the location, form, size, or any other characteristic of the means employed, the patentee must distinctly specify the peculiarities in which his invention is to be found. In two recent cases we have discussed this subject so fully that we do not think it now necessary to do more than to refer to what we have already held, and the authorities then cited on which, as well as upon what we have regarded as sound reason, our opinion is based. *Germer Stove Co. v. Art Stove Co.*, 150 Fed. 141, 80 C. C. A. 9; *Bullock Electric Co. v. General Electric Co.*, 149 Fed. 409, 79 C. C. A. 229.

3. Was the amendment of the application in the Patent Office on May 18, 1897, whereby a new theory of the invention was introduced without a new verification, and in the circumstances shown by the record, authorized by law? In considering this question, it is to be borne in mind that the principal merit of the invention is claimed to be in the location of the air ducts, whereby it is said the gas jet acquires an envelope of air wherein it passes to the place of combustion. In Dolan's original application, filed February 18, 1896, nothing is said of any such purpose, and nothing is prescribed in the specifications or claims to indicate that the burner was to be constructed with a view to the obtaining of any such result. And all of the claims were for the apparatus, and none for a process. There was nothing what-

ever either in the form of the burner or in the theory of its operation to differentiate it from the former art. In April, 1897, a new attorney was employed, who seems to have been more astute than the applicant. At all events, the theory was then conceived that the introduction of the air by a series of ducts around the gas jet would envelope the jet, and that both would pass in that form to the place of combustion whereby the contact of the gas with the orifice of the burner would be prevented. This new conception was not a conception of Dolan's. If there was invention in it, it was not his. His original application made no mention of it, and he made no communication of it to the attorney. He was sworn as a witness, and he characterized the idea as a "lawyer's trick for building up a theory of some kind, which at the time I didn't know anything about. There may be an envelope of air, and there may be a mixture. The whole matter is theoretical to my mind." Thereupon all the specifications and claims were erased and new ones incorporated, the first two claims for the process. The changes made in the application were manifestly to develop the newly conceived theory of the mode of operation, and to add claims for the process. If this was to be accomplished and the theory were to be embodied in practical means, the specifications should have been made to distinctly point out such means, as we have already pointed out. But in that regard the former specifications were retained. If the application as amended were to be construed as embodying such an invention as is now claimed, it was another and different invention from that for which the patent was originally sought, and, if an amendment having that consequence was permissible, it should have been verified by the oath of the inventor. *Railway Co. v. Sayles*, 97 U. S. 554, 24 L. Ed. 1053; *Eagleton Mfg. Co. v. West, etc., Mfg. Co.*, 111 U. S. 490, 4 Sup. Ct. 593, 28 L. Ed. 493; *Kennedy v. Hazelton*, 128 U. S. 667, 9 Sup. Ct. 202, 32 L. Ed. 576; *Michigan Central R. Co. v. Consolidated Car Heat Co.*, 67 Fed. 121, 31 U. S. App. 462, 14 C. C. A. 232; *Cleveland Foundry Co. v. Detroit Vapor Stove Co.*, 131 Fed. 853, 68 C. C. A. 233, the last two being cases decided by this court. The case of *Eagleton Mfg. Co. v. West, etc., Mfg. Co.*, *supra*, was strikingly like the case at bar in all the material facts which were made the basis of decision. *Eagleton*, the patentee, died soon after making his application. It was prosecuted by his administrators, by their attorneys. The amendment was made by them, but was not sworn to. The invention and application were assigned by the administrators to the *Eagleton Company* and the patent issued to it. In the present case Dolan 16 days after making his application assigned his entire interest to one Naph-eys, and it went through two more assignments before the amendment was filed. It is true that in the *Eagleton Case* the application had been a long time pending when the amendment was made, but that fact was not made the basis of the decision.

Whether in point of fact this theory of the mode of operation, namely, that the jet is enveloped by the air drawn in through the openings in the burner, is well founded or not, is a question upon which the experts whose testimony is in the record are at variance. That

theory is supported by witnesses for the appellee, while those for the appellant hold that the gas and air are commingled in the chamber, and there prepared for combustion. The contention of the appellee seems plausible, and we are in some doubt. The provision of such a chamber was probably intended for the purpose of commingling the gas and air to promote combustion, but it is possible that, in fact, the columns of gas and air retain to some extent a separate identity until after they leave the burner. However, we have in this discussion given the appellee "the benefit of the doubt."

We lay no stress upon the kind of material of which the burners are composed. That was a mere matter of choice and judgment for the artisan. This third claim does not specify what it shall be, and the specification in that regard states that it "is preferably made of lava or other material of a like character adapted to the purpose." Any suitable material meets the requirement.

The first and second claims are for a process or processes. They seem to us to be nothing else than claims for the function of the apparatus described. No doubt it is competent, when the circumstances permit it, for an inventor in describing a machine or apparatus which he has devised, to make a claim for a process which his patented device is capable of carrying out. But to entitle him to do this the process must be one capable of being carried out by other means than by the operation of his patented machine, and, unless such other means are known or within the reach of ordinary skill and judgment, the patentee is bound to point them out; for, unless the public are informed by what other means the process can be carried on, the process is to them nothing else than the operation of the machine—in other words, the exercise of its functions. In the present case no other means or way of practicing the process are suggested by the patentee than the particular device on which his claim for the apparatus rests. And it is impossible for us to see how the process which is the subject of these claims could be worked by any other means than the particular means described by the apparatus. Certainly it is not explained how else it could be done. Moreover, if the apparatus is not new, its functions are not new. See the observations of Mr. Justice Brown in *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136, and the cases there cited by him; and *Wessel v. United Mattress Mach. Co.*, 139 Fed. 11, 71 C. C. A. 423, and *American Crayon Co. v. Sexton*, 139 Fed. 564, 71 C. C. A. 548, two recent decisions of this court. Besides, the operation of the earlier burners disclosed the practice of the process the patentee proposes to make the subject of his patent. And in this connection it seems proper to repeat that the application for the patent which Dolan verified by his oath did not allege that he had invented a new process.

We are referred to a decision made by the Circuit Court of Appeals for the Second Circuit in *Kirchberger v. American Acetylene Burner Co.*, 128 Fed. 599, 64 C. C. A. 107, in which the Dolan patent was sustained. But with great respect we are not satisfied with the reasoning in the opinion delivered in that case. Some material facts are

therein assumed which were not, according to our understanding, sustained by the record, if it was the same as it is here. For instance, it is said at page 604 of 128 Fed., and page 112 of 64 C. C. A., referring to the Bullier burner:

"This burner is in many respects strikingly like that in the present suit. There are, however, these radical differences in construction: The air passages in the Bullier burner are located at such a distance below the head as to afford an opportunity for, if not to necessarily cause, a thorough mixing of the air and gas, while in the patent in suit the small chamber and orifice are so located at the uppermost end of the burner as to apparently prevent such mixing."

Now, as we have pointed out, Dolan did not state that his air ducts were at the uppermost end of his burner. He stated only that they came in between the constriction, C, at the lower end of the chamber and the orifice. And this was the very form of Bullier's burner shown in figure 1 of his addition of June 12, 1896, above set forth. Neither Bullier or Dolan states the length of his burner nor the distance of the air openings from the orifice. Neither states the size of his burners, but, whatever that might be, the location of the air openings on the chamber as shown by the respective drawings of Dolan and in Bullier's Addition, figure 1, is about the middle of the length of the chamber in each case, and these drawings are the only means we have of knowing where each would put them. From these it would appear, and especially from Bullier's figure 3 in his original patent, that the air ducts came in nearer to the orifice than do Dolan's, and in Bullier's figure 5 the circular air duct comes in just below the sides of the orifice, with the result of shielding the orifice from deposits as we have before shown. And the whole matter may be summed up in this: That from all that appears the mixing of the gas and air was as likely to occur in Dolan's as in Bullier's and so of the forming of an envelope for the protection of the orifice. The opinion of the Circuit Court of Appeals for the Second Circuit does not deal with the necessity of a definite statement of the locality of the air ducts on the chamber to differentiate his burner from earlier structures. In dealing with the subject of the amendment of the application, that court apparently held that because it did not appear that other inventors whose rights would be prejudiced had entered the field, and because the original drawings sufficiently show and suggest the claims finally made, the amendment was not invalid. As to the first reason, while it is true that in the case cited (*Railroad Co. v. Sayles*, 97 U. S. 554, 24 L. Ed. 1053) Mr. Justice Bradley referred to the fact that other inventors might be prejudiced by the amendment as a reason for denying its validity, yet that is not assigned as the only reason. It was held by this court in *Michigan Central R. Co. v. Consolidated Car Heating Co.*, supra, that an amendment which brought in the substance of the invention without the verification required by the statute was unauthorized and invalid. We regret to differ from the opinion of the Circuit Court of Appeals for the Second Circuit, but we could not agree without surrendering our own judgment.

Our conclusion is that the decree should be reversed, and the bill dismissed, with costs in the court below and in this court.

(155 Fed. 740.)

AMERICAN LAVA CO. et al. v. KIRSCHBERGER et al.

(Circuit Court of Appeals, Sixth Circuit. July 20, 1907.)

No. 1,649.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

Charles Neave, for appellants.

Louis C. Raegener, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This is an appeal by the defendant below from an order granting a preliminary injunction in a suit for the infringement of the Dolan patent, No. 589,342.

The suit is one coming from the same court as did case No. 1,642, American Lava Co. v. Steward, 155 Fed. 731, 84 C. C. A. 157, and the order appealed from was doubtless based upon the holding in that case that the Dolan patent was valid. The two causes were heard together in this court. The conclusion which we have announced in the other case is decisive of this, and the order appealed from will be reversed, with a direction to dismiss the bill with the costs of both courts.

(155 Fed. 278.)

POTTER v. LAKE SHORE NOVELTY CO.

(Circuit Court of Appeals, Sixth Circuit. June 26, 1907.)

No. 1,647.

PATENTS—INVENTION—DETONATING DEVICE.

The Potter patent, No. 689,906, for a detonating device for exploding toy torpedoes, is void for lack of invention and anticipation.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

In Equity. Suit for infringement of letters patent No. 689,906, for a detonating device granted to George M. Potter December 31, 1901.

The following is the opinion of the Circuit Court by Tayler, District Judge:

This is a bill in equity, wherein the complainant claims that the defendant is infringing patent No. 689,906, relating to a detonating device for exploding toy torpedoes, granted to the complainant. The bill asks for the usual relief. The defendant denies infringement, and also the validity of the patent. The case is here on final hearing.

Without going into a recital of the nature of the patent and the testimony introduced on the issues made, it is enough for me to announce my conclusion, as follows:

1. If all that the complainant did was to obtain the patent for casting the partition separating the explosion chamber and the socket integrally, instead of forming the partition from a separate piece and securing it in place by a

rivet or set screw, then I find that the complainant was not the inventor of such a method.

2. As to the other claim of novelty and usefulness in the patent, I find that it is not novel, having been anticipated by other patents.

Decree may therefore be entered dismissing the bill, at the complainant's costs.

S. B. Fouts and T. W. Bakewell, for appellant.

H. A. Toulmin, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

PER CURIAM. This cause is affirmed upon the opinion of the court below.

(156 Fed. 1.)

BUTLER BROS. SHOE CO. v. UNITED STATES RUBBER CO.

(Circuit Court of Appeals, Eighth Circuit. October 25, 1907.)

No. 2,496.

1. EQUITY—PLEA OR ANSWER—OBJECTIONS—WAIVER.

Filing a replication and taking the proofs waives no substantial insufficiency of the facts set forth in a plea or answer to constitute a defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 664, 665.]

2. CORPORATIONS—FOREIGN CORPORATION—POWER OF STATE TO EXCLUDE OR CONDITION ITS BUSINESS NOT UNLIMITED—EXCEPTIONS.

The broad statement in *Paul v. Virginia*, 8 Wall. 168, 181, 19 L. Ed. 357, that a state may exclude a foreign corporation from business, or may condition its admission to do business within its borders by such terms as it may deem proper, has been qualified by the decisions of the Supreme Court, and the following exceptions to it are established:

(a) Every corporation empowered by the state of its creation to engage in interstate commerce may carry on that commerce in sound and recognized articles of commerce in every other state in the Union. Every prohibition, obstruction, or burden which the other states attempt to impose upon such business is unconstitutional and void.

(b) Every corporation of every state which is in the employ of the United States, has the right to exercise the necessary corporate powers and to transact the requisite business to discharge the duties of that employment in every other state in the Union, without let or hindrance from the latter.

(c) Every corporation of every state has the absolute right to institute, maintain, and defend in the federal courts, and to remove to those courts its suits in any other states in the cases and on the terms prescribed by the acts of Congress.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Commerce, §§ 7, 100; vol. 13, Courts, § 860; vol. 42, Removal of Causes, § 64.]

3. SAME—PROHIBITION WITHOUT DISCRIMINATION OF ALL BUSINESS, UNCONSTITUTIONAL AS TO INTERSTATE COMMERCE.

Where a corporation of one state is engaged in both interstate and intrastate commerce in any other state, the prohibition or the conditioning by the latter state of its exercise of its right to do business within its borders, without discriminating between that which constitutes interstate commerce and that which constitutes intrastate commerce, is unconstitutional and void, so far as it relates to the former.

4. COMMERCE—INTERSTATE COMMERCE IN SOUND ARTICLES FREE FROM STATE REGULATION WHERE CONGRESS HAS NOT ACTED.

Interstate commerce in sound and well-recognized articles of commerce must be free, and any prohibition, obstruction, or burden of it by a state by any method is unconstitutional. Such commerce may not be regulated by a state at all. The exclusive power to regulate commerce among the states is vested in the Congress.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Commerce, § 7.]

5. SAME—FACTORAGE CONTRACTS BETWEEN CITIZENS OF DIFFERENT STATES ARE TRANSACTIONS OF—CONDITIONAL SALE AND FACTORAGE CONTRACT DISTINGUISHED.

A manufacturing corporation of New Jersey made annual contracts with a corporation of Colorado engaged in the wholesale business in that state, whereby the former agreed to send from its mill and warehouse in Eastern states to the latter in Colorado, upon its orders, rubber boots, shoes, and other rubber goods during the year for sale, and the latter agreed to receive, to store, and to sell them in its name as consignee, and to pay to the former for the goods which the latter sold certain agreed prices, which were so much less than its selling prices to its customers that it secured thereby the expenses of carrying on the business and a liberal commission. The contracts provided that the latter was appointed the agent of the former to sell the goods, that the latter should make advances when requested, that to the amount of its profits it guaranteed the sales, that the goods and their proceeds, until the latter paid the agreed prices, should be the property of the former, and that the latter assumed the risk of the receiving, storing, handling, and selling. The manufacturing corporation shipped the goods as agreed. It had no office, warehouse, or place of business in Colorado, and it neither incurred nor paid any of the expenses of receiving, storing, and selling the goods. The Colorado corporation ordered, received, stored, and sold the merchandise at its own expense, in consideration of the factorage secured to it by the contracts. *Held*:

(a) The agreements were factorage contracts, and they were not contracts for conditional sales.

(b) The making of the contracts and their performance by the New Jersey corporation were transactions of interstate commerce, which could not be lawfully prohibited or trammelled by the legislation or action of the state of Colorado.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1335; vol. 10, Commerce, § 29.]

6. CORPORATIONS—FOREIGN CORPORATION—CONSTITUTION AND STATUTES OF COLORADO REGARDING, IF LITERALLY CONSTRUED, UNCONSTITUTIONAL—THEY SHOULD BE INTERPRETED TO RELATE TO INTRASTATE COMMERCE AND THE COLORADO COURTS ONLY.

The Constitution and statutes of Colorado by their plain terms prohibit every foreign corporation from doing any business whatever, from exercising any corporate power, and from prosecuting or defending any suit in that state, unless it files certain writings, pays certain fees to certain officers and an annual license fee of 2 cents for each \$1,000 of its capital stock, and they provide that a failure to pay the annual license fee shall constitute an absolute defense to all actions and proceedings brought by it in any court within the limits of the state, upon any transaction growing out of such business, until the license fee is paid. *Held*:

(a) This legislation, if literally interpreted, is unconstitutional and void, in so far as it prohibits or conditions the exercise by a corporation of another state of its right to carry on the business of interstate commerce in Colorado, and in so far as it prohibits or limits the exercise in that state by a foreign corporation of its right to institute and defend in the national courts suits for and against it arising out of that commerce.

(b) The true construction of this legislation is that it was intended to govern intrastate commerce and suits in the state courts in Colorado only,

and it is inapplicable to the business of interstate commerce in that state and to the right of a foreign corporation to institute, maintain, and defend suits in the federal courts.

(c) In the making and performance of the factorage contracts in suit the New Jersey corporation was not doing business in Colorado within the true meaning of the Constitution and statutes of that state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 2519, 2524.]

7. COURTS—JURISDICTION OF NATIONAL COURTS—STATE LEGISLATION MAY NOT REVOKE OR IMPAIR.

While the national courts may enforce rights created and remedies granted by state statutes according to their terms, the jurisdiction and power of those courts was not granted by, and it may not be revoked, annulled, or impaired by, state legislation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 795.]

8. CORPORATIONS—FOREIGN CORPORATION—CONSIGNMENT OF GOODS TO FACTOR IN ANOTHER STATE NOT DOING BUSINESS THEREIN.

A foreign corporation, which has no warehouse, office, or place of business, and which neither incurs nor pays any of the expenses of receiving, handling, storing, or selling its goods, in a state to which it consigns them to its factor, who conducts all the business there, assumes and pays all the expenses of receiving, selling, handling, and storing the goods, is not doing business in the latter state within the true meaning of the statutes relative to the admission of foreign corporations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2524.]

9. EQUITY—JURISDICTION—CONTROVERSY OVER EXTENDED ACCOUNT INVOKES.

An action at law is not as practicable, efficient, or adequate a remedy as a suit in equity, where the controversy involves an account which consists of many items, and a federal court has jurisdiction of it in equity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 151; vol. 1, Account, § 65.]

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Colorado.

See 132 Fed. 398.

The United States Rubber Company, a corporation of New Jersey, was a large manufacturer of rubber goods, and its principal office was in New York. It had a factory in one of the Eastern states and a warehouse in Chicago, from which it shipped its merchandise to consignees and purchasers. The Butler Bros. Shoe Company, a corporation of Colorado, was a wholesale merchant engaged in the purchase and sale of rubber goods and other merchandise at Denver, in that state. In January, 1901, in January, 1902, and in January, 1903, it made similar factorage contracts with the rubber company for the shipment of the goods of the latter from its mill and warehouse to the shoe company at Denver upon its orders. By the contract of January, 1903, the rubber company appointed the shoe company its agent to sell, and agreed to consign to it at Denver, certain of its goods at agreed prices, and the shoe company agreed to receive the goods and assume the risk thereof; to pay freight and expenses of handling, carting, storing, selling, and delivering to its customers; to make advances to the rubber company in cash, or in notes, if requested; to guarantee the rubber company against all losses from sales to the extent of the shoe company's profits; to pay the rubber company at agreed prices, which were so much below the prices at which the shoe company sold to its customers that it thereby secured a liberal factorage or commission, and at specified times, for all consigned goods it sold to its customers; to purchase, at the option of the rubber company, at the termination

of the contract, all of the consigned goods then in its possession, except original and unbroken packages, at the prices that should then be ruling; to keep separate account books of the goods, of their receipt and sales; to keep a separate bank account under the name of the "Butler Bros. Shoe Company Consignee Account," in which the proceeds of the sales, including the consignee's profits or factorage should be deposited, and from which the consignee should check out the amounts due the consignor, the freight charges, and the consignee's profits or factorage; to bill the goods to the purchasers as consignee, and that all goods then on hand and those subsequently consigned should be the property of the consignor until they were sold to the consignee's purchasers; and that the books, accounts, bills receivable, and cash derived from the sales of the consigned property should be the property of the consignor. Pursuant to this contract the consignee ordered for sale to its customers, and the consignor shipped from its warehouse in Chicago, and from its mill, to Denver, Colo., goods of the value of many tens of thousands of dollars. After a few months the rubber company demanded an advance in cash from the factor. The latter failed to make this advance, but at the same time ordered the rubber company to send to it from \$15,000 to \$20,000 worth of rubber goods to fill orders it had previously taken from its customers therefor. In this state of the case, on October 22, 1903, the parties made a supplemental agreement to the effect that the consignor would waive its demand for the advance and would fill the factor's orders, and that the factor would pay the consignor for all the goods which it sold to its customers 60 days after the accounts for them fell due. The contracts provided that they should terminate at the end of one year from January, 1903. At the end of the year the factor made default in its payments, and in March, 1904, the rubber company exhibited its bill against the shoe company in the court below for an accounting, for a receiver of the property in the hands of the factor under the contract, for an injunction, for a recovery of its property remaining in the possession of the shoe company, and for a recovery of the moneys which the shoe company owed to it. The defendant answered, among other things, that the complainant had not qualified itself to do business in Colorado and had not paid the annual license tax prescribed by the statutes of Colorado for the doing of business in that state by a foreign corporation. To this portion of the answer the complainant excepted, its exception was overruled, and it then filed a general replication. Evidence was taken, there was a final hearing on the merits, and the court below rendered a decree that the complainant should receive \$8,276.47 which remained in the bank in the "Butler Bros. Shoe Company Consignee Account," \$29,647.09 which the receiver had realized from the goods, bills receivable, and accounts that accrued under the consignment and were taken from the shoe company by the receiver, and that the rubber company should recover of the shoe company \$14,856.27 which the latter owed it, and the costs of the suit. From this decree the shoe company appealed.

J. E. Robinson (Charles J. Hughes, Jr., on the brief), for appellant.
Henry T. Rogers (Lucius M. Cuthbert, Daniel B. Ellis, and Pierpont Fuller, on the brief), for appellee.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Counsel for the appellant first assailed the decree on the ground that, by filing the replication after its exception to the defense that the complainant had been doing business in the state of Colorado without a license was overruled, the complainant estopped itself from again questioning the sufficiency of that defense. This is not a case in which complainant waived its objections to the answer by failing

to file any exception to it (Story's Equity Pleading [10th Ed.] § 877; Slater v. Maxwell, 73 U. S. 268, 275, 18 L. Ed. 796; Hughes v. Blake, 6 Wheat. 463, 472, 5 L. Ed. 303; Farley v. Kittson, 120 U. S. 303, 314, 7 Sup. Ct. 534, 30 L. Ed. 684); and, even if it were, the facts alleged therein, if proved, would avail the defendant, under equity rule No. 33, only so far as in law and equity they ought to avail it. In the national courts the complainant in equity does not waive any substantial insufficiency of the facts set forth in a plea or answer to constitute a defense by filing a replication and taking the proofs. Pearce v. Rice, 142 U. S. 28, 42, 12 Sup. Ct. 130, 35 L. Ed. 925; Green v. Bogue, 158 U. S. 478, 500, 15 Sup. Ct. 975, 39 L. Ed. 1061; Soderberg v. Armstrong (C. C.) 116 Fed. 709.

The second and chief objection of counsel to the decree is that the contracts of factorage were illegal, and therefore void, because the complainant was a foreign corporation, and it carried on business in the state of Colorado without a license in violation of the statutes of that state. The contract of January, 1903, when reduced to its lowest terms, was that for one year the complainant would send on the orders of the defendant from its factory and warehouse in Eastern states shoes, boots, and rubber goods to the shoe company in Colorado, that the latter would make such advances to the complainant as it requested and would conduct the business and pay all the expenses of selling the goods for the factorage or commission, which consisted of the difference between the agreed prices between the parties to the contracts and the selling prices to the purchasers from the factor. The question has been exhaustively argued whether this was a contract for a conditional sale or a contract of agency. It did not evidence a conditional sale, because there was no obligation of the rubber company to transfer the title to the shoe company for an agreed price, and no obligation of the shoe company to pay an agreed price for the goods. There was no vendor or vendee named in the agreement. It was a contract of bailment for sale, not a contract of sale. In re Columbus Buggy Co., 143 Fed. 859, 74 C. C. A. 611. It was a contract of factorage. The supplemental contract of October, 1903, relieved the factor of making advances and bound it to guarantee payment for the goods it sold. It transformed the factor into a *del credere* factor. Were these contracts illegal and void?

The Constitution and the statutes of Colorado by their terms prohibit any foreign corporation from doing any business, exercising any corporate power, acquiring or holding any property, or prosecuting or defending any suit in the state, unless it has first filed with the Secretary of State a certificate of its incorporation, a written appointment of an agent in the state to accept service of process, and a written specification of a principal place of business in the state, has paid to the Secretary of State \$30 for its first \$50,000 and 50 cents for each additional \$1,000 of its capital stock, a fee of \$5, and numerous other fees for filing papers and issuing his certificate, and has paid to the Auditor of the State an annual license fee of 2 cents for each \$1,000 of its capital stock. Const. Colo. art. 15, § 10; 1 Mills' Ann. St. §§ 499, 500; Sess. Laws Colo. 1901, p. 121, c. 52, § 10;

Sess. Laws 1902, p. 73, c. 3, § 64. The statutes of Colorado further provide that a failure to file this certificate of incorporation shall render each officer, agent, and stockholder of the foreign corporation liable for all contracts made in Colorado while it is in default (1 Mills' Ann. St. § 501), and that a failure to pay the annual license tax shall deprive the corporation absolutely of all rights and privileges to do business in the state, and shall constitute an absolute defense to all actions, suits, and proceedings in law or equity brought by the corporation in any court of competent jurisdiction within the limits of the state, until the tax is paid. Sess. Laws Colo. 1902, p. 74, c. 3, § 66. It is obvious that by the literal terms of this Constitution and these statutes no foreign corporation may lawfully exercise any corporate power, maintain any suit in any state or federal court, or do any business of any kind whatever in the state of Colorado, unless it first pays the license fees which that state has prescribed for permission to do business therein. Is this the true meaning of this statute? Is a contract by a manufacturer or owner of articles of commerce to send them from one state to a factor in another to be sold by him for an agreed commission doing business in the latter state, within the true intent and meaning of such laws? If a California corporation ships a car load of fruit to a commission merchant in New York to be sold by him on agreed factorage, is the California corporation doing business in New York within the meaning of its statutes of this character? If it contracts to ship 1,000 car loads during a year on the same terms, is it violating the statutes of New York, unless it obtains a license to do business there? Counsel for the appellant insist that the appellee was doing business in Colorado under these contracts, and that they were void because it thus violated the laws of that state. They quote and rely upon the remarks of Mr. Justice Field, in *Paul v. Virginia*, 8 Wall. 168, 181, 19 L. Ed. 357, where he said:

"Now a grant of corporate existence is a grant of special privileges to the incorporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. Ed. 274: 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers is prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

From the statements in this quotation, counsel argued that the power and purpose of the state of Colorado were unrestricted, and that a foreign corporation cannot lawfully exercise any corporate power or do

any business whatever in the state of Colorado without a compliance with the requirements of its statutes. But the contention fails to give due weight to the Constitution of the United States, to the opinions of the Supreme Court which have construed it, and to the actual decision in *Paul v. Virginia*. In that case Paul had been convicted of delivering an insurance policy as agent of a foreign corporation in violation of the laws of the state of Virginia, which prescribed the terms on which such corporations might do business in the state. He insisted that these laws were unconstitutional, because they deprived the foreign corporation of the privileges and immunities of the citizens of the several states, and because they constituted a regulation of commerce among the states. The Supreme Court decided that a foreign corporation was not a citizen, within the true intent of the clause of the Constitution which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states" (8 Wall. 177-180, 19 L. Ed. 357); that such a corporation was within the provision of the Constitution that Congress shall have power "to regulate commerce with foreign nations and among the several states," but that an issue of a policy of insurance was not a transaction of commerce. "It is undoubtedly true, as stated by counsel," said the court, "that the power conferred upon Congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals. * * * The language of the grant makes no reference to the instrumentalities by which commerce may be carried on. It is general, and includes alike commerce by individuals, partnerships, associations, and corporations." 8 Wall. 182, 183, 19 L. Ed. 357.

In *Pensacola Telegraph Company v. Western Union Telegraph Company*, 96 U. S. 1, 8, 24 L. Ed. 708, the state of Florida had granted to the Pensacola Telegraph Company the exclusive right to establish and maintain lines of electric telegraph in certain counties of the state, and the Western Union Telegraph Company, a foreign corporation, sought to erect a line of telegraph therein. Chief Justice Waite opened the opinion of the court in that case in these words:

"Congress has power 'to regulate commerce with foreign nations and among the several states' (Const. art. 1, § 8, par. 3) and 'to establish post offices and post roads' (Id. par. 7). The Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land. A law of Congress made in pursuance of the Constitution suspends and overrides all state statutes with which it is in conflict. Since the case of *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, it has never been doubted that commercial intercourse is the element of commerce which comes within the regulating power of Congress."

And he announced the unanimous opinion of the court that the grant of the exclusive right by the state of Florida to the Pensacola Company, and its attempt thereby to exclude the foreign corporation from certain portions of the state, were futile. Of the case of *Paul v. Virginia* he said:

"We are aware that in *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357, this court decided that a state might exclude the corporation of another state from its jurisdiction, and that corporations are not within the clause of the Constitution which declares that 'the citizens of each state shall be entitled to all

privileges and immunities of citizens in the several states.' Article 4. § 2. That was not, however, the case of a corporation engaged in interstate commerce; and enough was said by the court to show that, if it had been, very different questions would have been presented."

In *Cooper Manufacturing Company v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137, a corporation of the state of Ohio, in the face of the constitutional and statutory prohibition against doing business in Colorado, without filing its certificate of incorporation, appointing its agent for service, and specifying its principal place of business in that state, made a contract in the state of Colorado, with citizens of that state, to sell and deliver to them in Ohio a steam engine and other machinery for an agreed price. The purchasers refused to pay the price, and pleaded in answer to an action for it the invalidity of the contract, because the Ohio corporation had failed to comply with the qualifying statute, and the court dismissed the action. The Supreme Court reversed that judgment. It held that the Constitution and the statutes of Colorado could not be so literally construed as to prohibit a single act of business within the state, and added:

"So it is clear that the statute cannot be construed to impose upon a foreign corporation limitations of its right to make contracts in the state for carrying on commerce between the states, for that would make the act an invasion of the exclusive right of Congress to regulate commerce among the several states."

Mr. Justice Matthews and Mr. Justice Blatchford delivered a concurring opinion (pages 736, 737, of 113 U. S. page 742 of 5 Sup. Ct. [28 L. Ed. 1137]), in which they announced the rule upon this subject which has ever since prevailed in that court. They said:

"In the present case, the construction claimed for the Constitution of Colorado and the statute of that state passed in execution of it cannot be extended to prevent the plaintiff in error, a corporation of another state, from transacting any business in Colorado which of itself is commerce. The transaction in question was clearly of that character. It was the making of a contract in Colorado to manufacture certain machinery in Ohio, to be there delivered for transportation to the purchasers in Colorado. That was commerce; and to prohibit it, except upon conditions, is to regulate commerce between Colorado and Ohio, which is within the exclusive province of Congress. It is quite competent, no doubt, for Colorado to prohibit a foreign corporation from acquiring a domicile in that state, and to prohibit it from carrying on within that state its business of manufacturing machinery. But it cannot prohibit it from selling in Colorado, by contracts made there, its machinery manufactured elsewhere, for that would be to regulate commerce between the states."

In *Pembina Mining Company v. Pennsylvania*, 125 U. S. 181, 190, 8 Sup. Ct. 737, 741, 31 L. Ed. 650, the Supreme Court held that a state might exact a license fee for allowing a corporation, which was not engaged in interstate or foreign commerce, to maintain an office for its officers, stockholders, agents, and employes, but added that the power to exclude a foreign corporation from doing business within its limits, or to exact conditions for allowing it so to do, or for allowing it to hire offices therein did not exist, "where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign. The control of such com-

merce, being in the federal government, is not to be restricted by state authority."

In *Fritts v. Palmer*, 132 U. S. 282, 283, 10 Sup. Ct. 93, 33 L. Ed. 317, a foreign corporation which was not engaged in commerce purchased, took, and conveyed a title to real estate in Colorado without filing the certificate of incorporation and appointments required by the Constitution and statutes of that state, and the Supreme Court sustained the title upon the ground that the only penalty for the violation of the statutes was the liability of the officers and stockholders imposed in such cases.

In *Lyng v. Michigan*, 135 U. S. 161, 166, 10 Sup. Ct. 725, 726, 34 L. Ed. 150, the state of Michigan imposed an annual tax of \$300 upon the business of selling brewed or malt liquors. Citizens of Wisconsin were engaged in manufacturing such liquors at Green Bay, in that state. They owned a warehouse at Iron River, in the state of Michigan, to which they shipped and in which they stored their liquor for sale in the original packages, and they employed Lyng as their agent to sell it there. Neither they nor their agent paid the tax; but he sold the liquor, and was arrested and convicted for a violation of the law. The Supreme Court reversed the conviction, citing *Le Loup v. Mobile*, 127 U. S. 640, 648, 8 Sup. Ct. 1380, 32 L. Ed. 311, and *Bowman v. Chicago & Northwestern Railway*, 125 U. S. 465, 8 Sup. Ct. 689, 31 L. Ed. 700, and said:

"We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

In *Norfolk & Western R. R. Co. v. Pennsylvania*, 136 U. S. 114, 115, 118, 120, 10 Sup. Ct. 958, 960, 34 L. Ed. 394, the state of Pennsylvania had prohibited every foreign corporation, except insurance companies, which did not invest and use its capital in that commonwealth, from having any office or offices in that state, unless it paid an annual tax or license fee of one-fourth of a mill upon each dollar of its authorized capital to the auditor of the state. The Norfolk & Western Railroad Company was a foreign corporation. It had no railroad, and with trifling exceptions no capital, in the state of Pennsylvania; but its line of railroad in Virginia and West Virginia connected with other railroads, so that it formed a link in a through line of railroad over which, as a part of the business thereof, freight and passengers were carried into and out of the state. It had offices in Pennsylvania for the use of its officers, stockholders, agents, and employes. The Auditor assessed the annual tax upon it, and the state recovered a judgment therefor, which was affirmed by the Supreme Court of Pennsylvania. The Supreme Court of the United States reversed that judgment and said:

"It is well settled by numerous decisions of this court that a state cannot, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burden upon such commerce within its limits. * * * One of the terms of the contract by which

the plaintiff in error became a link in the through line of road referred to in the findings of fact provided that 'It shall be the duty of each initial road, member of the line, to solicit and procure traffic for the Great Southern Despatch [the name of said through line] at its own proper cost and expense.' Again, the plaintiff in error does not exercise, or seek to exercise, in Pennsylvania any privilege or franchise not immediately connected with interstate commerce and required for the purposes thereof. Before establishing its office in Philadelphia it obtained from the Secretary of the Commonwealth the certificate required by the act of the state Legislature of 1874 enabling it to maintain an office in the state. That office was maintained because of the necessities of the interstate business of the company, and for no other purpose. A tax upon it was, therefore, a tax upon one of the means or instrumentalities of the company's interstate commerce, and as such was in violation of the commercial clause of the Constitution of the United States. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158; *Philadelphia Steamship Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. Ed. 1200, and cases cited; *McCall v. California*, 136 U. S. 104, 10 Sup. Ct. 881, 34 L. Ed. 392."

In *Crutcher v. Kentucky*, 141 U. S. 47, 57-59, 11 Sup. Ct. 851, 853, 854, 35 L. Ed. 649, the Legislature of that state had prohibited any agent of a foreign express company from doing business in the state unless the express company first filed with the Auditor of the State a statement of its articles of association and satisfactory evidence that it had \$150,000 invested in some safe dividend paying stock and had paid to the Auditor of State fees to the amount of \$20. *Crutcher*, the agent of a foreign corporation which was engaged in both interstate and intrastate commerce in Kentucky, was convicted and fined for a violation of this statute, and his conviction was affirmed by the Supreme Court of the state. But the Supreme Court of the United States reversed that conviction, and held that the state statute was unconstitutional and void, with declarations of the law which bear with compelling force upon the issue in this case. It said:

"If a partnership firm of individuals should undertake to carry on the business of interstate commerce between Kentucky and other states, it would not be within the province of the state Legislature to exact conditions on which they should carry on their business, nor to require them to take out a license therefor. To carry on interstate commerce is not a franchise or a privilege granted by the state. It is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject. It has frequently been laid down by this court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce. Would any one pretend that a state Legislature could prohibit a foreign corporation—an English or a French transportation company, for example—from coming into its borders and landing goods and passengers at its wharves, and soliciting goods and passengers for a return voyage, without first obtaining a license from some state officer, and filing a sworn statement as to the amount of its capital stock paid in? And why not? Evidently because the matter is not within the province of state legislation, but within that of national legislation. * * * And the same thing is exactly true with regard to interstate commerce as it is with regard to foreign commerce. * * * We do not think that the difficulty is at all obviated by the fact that the express company, as incidental to its main business (which is to carry goods between different states), does also some local business by carrying goods from one point to another within the state of Kentucky. This is, probably, quite as much for the accommodation of the people of that state as for the advantage of the company. But, whether so or not, it does not obviate the objection

that the regulations as to license and capital stock are imposed as conditions on the company's carrying on the business of interstate commerce, which was manifestly the principal object of its organization. These regulations are clearly a burden and a restriction upon that commerce. Whether intended as such, or not, they operate as such."

In *Horn Silver Mining Company v. New York State*, 143 U. S. 305, 315, 12 Sup. Ct. 403, 405, 36 L. Ed. 164, a corporation of Utah, which alleged in its answer that it was a manufacturing corporation carrying on manufactures in the state of New York, and which was found by the courts to have been engaged in business independently of interstate commerce, was held to be subject to a franchise tax levied upon all corporations, domestic and foreign, by a law of the state of New York. But Justice Field, who delivered the opinion of the court in that case and also in *Paul v. Virginia*, after quoting the unrestricted terms he used in the latter case, declared that two qualifications or exceptions to the power of a state to destroy or limit the right of a foreign corporation to do business within its limits had been established—one, that it could not exclude or condition the right of a foreign corporation to transact the business of interstate or foreign commerce within its borders; and another, that it could not exclude or condition the right of such a corporation to do business in the state when it was in the employ of the general government.

In *Osborne v. Florida*, 164 U. S. 650, 655, 17 Sup. Ct. 214, 41 L. Ed. 586, the Supreme Court of that state held that one of its statutes, which imposed a license fee upon all express companies doing business in the state, did not apply to or affect in any manner the business of a company which was interstate in its character, and that, so long as an express company confined its operations to interstate or foreign commerce, it was wholly exempt from this statute, and the Supreme Court sustained that decision, and in reviewing *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649, made these remarks which are pertinent to the Colorado Constitution and statutes here under consideration:

"The statute herein differs from the cases where statutes upon this subject have been held void, because in those cases the statutes prohibited the doing of any business in the state whatever, unless upon the payment of a fee or tax. It was said as to those cases that, as the law made the payment of the fee or the obtaining of the license a condition to the right to do any business whatever, whether interstate or purely local, it was on that account a regulation of interstate commerce, and therefore void. Here, however, under the construction as given by the state court, the company suffers no harm from the provisions of the statute. It can conduct its interstate business without paying the slightest heed to the act, because it does not apply to or in any degree affect the company in regard to that portion of its business which it has the right to conduct without regulation from the state. The company in this case need take out no license and pay no tax for doing interstate business, and the statute is therefore valid."

In *Miller v. Ammon*, 145 U. S. 421, 422, 12 Sup. Ct. 884, 36 L. Ed. 759, cited by the appellant, a citizen of Wisconsin purchased of the plaintiff in Chicago, on credit, and the plaintiff delivered to the purchaser in Chicago, wine, in violation of the ordinance of the city of Chicago, which prohibited such a sale in that city without a license, under a penalty of from \$50 to \$100. There was no interstate commerce

in the transaction, and the Supreme Court held that the liquor traffic was freighted with peril to the general welfare, that the contract of sale was unlawful, and that the plaintiff could not recover the purchase price.

In *Missouri, Kansas & Texas Trust Company v. Krumseig*, 172 U. S. 351, 19 Sup. Ct. 179, 43 L. Ed. 474, the Supreme Court of Minnesota had held that a statute of that state which declared that, whenever it satisfactorily appeared to a court that any evidence of debt was usurious, the court should declare it void, required the court to declare it void, without requiring the moneys borrowed upon it to be repaid, and the Supreme Court held that this construction must be given to the statute in a suit in equity in the federal court, based upon the statute. But that court added:

"Of course, these views are not applicable to cases arising out of interstate commerce, where the policy to be enforced is federal."

In *Diamond Glue Co. v. U. S. Glue Company*, 187 U. S. 611, 23 Sup. Ct. 206, 47 L. Ed. 328, a foreign corporation, without qualifying to do business according to the law of the state of Wisconsin, made a contract to supervise the plans for a glue factory to be built upon a site in that state, to manage the manufacturing in the factory, to operate it for the defendant, and to do various other things. After the factory had been erected and put in operation, the defendant failed to comply with some of its terms, and the foreign corporation brought a suit upon it. The Supreme Court held that the contract was not for the carrying on of interstate commerce, but for the doing of a local business in the state of Wisconsin, and that it could not be enforced. This case is cited and much relied upon by counsel for the appellant; but it fails to govern the issue here in controversy, because the contract of the foreign corporation in that case was to carry on a local business in the state of Wisconsin.

In *Chattanooga Building & Loan Ass'n v. Denson*, 189 U. S. 408, 23 Sup. Ct. 630, 47 L. Ed. 870, cited by appellant, no question of interstate commerce arose, and the Supreme Court followed the opinion of the highest judicial tribunal of Alabama, to the effect that loaning money and taking a mortgage upon property in that state constituted doing business therein, and made the note and mortgage void where it had been taken by a foreign corporation without complying with the qualifying statute of the state.

In *Pennsylvania Lumbermen's Mutual Fire Insurance Co. v. Meyer*, 197 U. S. 407, 25 Sup. Ct. 483, 49 L. Ed. 810, and *Board of Trade v. Hammond Elevator Co.*, 198 U. S. 424, 441, 25 Sup. Ct. 740, 49 L. Ed. 1111, no question of the regulation of interstate commerce arose, and the only issue was whether the foreign corporations had been doing business in the state to such an extent that the service of process upon one of their directors or agents therein was a lawful service upon the corporation.

In *Caldwell v. North Carolina*, 187 U. S. 622, 623, 23 Sup. Ct. 229, 47 L. Ed. 336, an ordinance of the city of Greensboro prohibited every person from engaging in the business of selling or delivering picture frames, pictures, photographs, or likenesses of the human face, unless

he first paid a license tax of \$10 for each year. A foreign corporation, without paying this license tax, obtained contracts for pictures and frames through its solicitors in the city of Greensboro. It secured rooms in a hotel in the city, and shipped the pictures and frames from Chicago in large and separate packages to itself at Greensboro, where one of its agents took the packages from the railway freight station to the company's rooms, broke them open, put the pictures in their respective frames, and then delivered them to the purchasers. He was convicted of a violation of the ordinance, and the Supreme Court of the state sustained his conviction on the familiar ground that the ordinance made no discrimination between foreign and domestic corporations, or between interstate and intrastate commerce. The Supreme Court answered this contention in these words, quoted from an earlier opinion:

"It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other states; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state. This was decided in the case of *The State Freight Tax*, 15 Wall. 232, 21 L. Ed. 146. The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce. A New Orleans merchant cannot be taxed there for ordering goods from London or New York, because in the one case it is an act of foreign and in the other of interstate commerce, both of which are subject to regulation by Congress alone."

It then quoted the opinion of the Supreme Court of North Carolina, that the transaction was not interstate commerce because the pictures and frames were shipped to the foreign corporation itself in Greensboro, were taken to its rooms in the hotel, there taken out of their original packages and put together, and then delivered by its agent, although it conceded that if the pictures had been placed in their frames in Chicago, and then shipped directly to the purchasers in original packages, that business might have been interstate commerce, and said:

"We are not persuaded by their reasoning. It seems to proceed upon two propositions: First, that the pictures in question were not completed before they were brought to Greensboro; and, second, that the articles were not shipped directly to the purchasers, but to an agent of the sender in Greensboro. But it certainly cannot be pretended that, if the pictures and the disconnected frames had been directly shipped to the purchasers, the license tax could have been imposed, either on the vendor out of the state, or on the purchaser within the state. If the pictures and the frames intended for them had been shipped directly to the purchasers, whether in the same or separate packages, such a transaction would, beyond question, be interstate commerce, beyond the reach of the taxing power of the state. It is too plain for argument that the supposed incomplete condition of articles of commerce, if shipped directly to the purchasers, cannot subject them to the license tax. * * * Nor does the fact that these articles were not shipped separately and directly to each individual purchaser, but were sent to an agent of the vendor at Greensboro, who delivered them to the purchasers, deprive the transaction of its character as interstate commerce. * * * That the articles were sent as freight by rail, and were received at the railroad station by an agent who delivered them to the respective purchasers, in no wise changes the character of the commerce as interstate. Transactions between manufacturing companies in one state, through agents, with citizens of another, constitute a large part of interstate commerce; and for us to hold, with the court below, that

the same articles, if sent by rail directly to the purchasers, are free from state taxation, but, if sent to an agent to deliver, are taxable through a license tax upon the agent, would evidently take a considerable portion of such traffic out of the salutary protection of the interstate commerce clause of the Constitution."

In the light of the foregoing decisions there can be no doubt that no state in the Union retains the power to exclude a foreign corporation from, or to condition or burden its exercise of its constitutional right to carry on interstate commerce in recognized staple articles of commerce within the limits of the state.

There is yet another exception to the power of a state to condition the right of a foreign corporation to do business within its borders. It may not limit that right by requiring the corporation, as a condition of doing business, to waive or surrender its right to a determination of its controversies with citizens of other states in the national courts.

In *Insurance Company v. Morse*, 20 Wall. 445, 455, 456, 22 L. Ed. 365, the state of Wisconsin had enacted a law which by its terms conditioned the exercise by an insurance corporation of its right to do business in the state by requiring a contract on its part not to remove any suit against it to the federal court. The corporation made the agreement, but subsequently filed a petition and gave a bond for the removal of the action against it, brought by a citizen of Wisconsin, from the state court to the federal court. The court of the state denied the petition and gave judgment for the plaintiff, which was affirmed by the Supreme Court of the state. The Supreme Court of the United States again quoted and qualified the broad statement of the power of a state to exclude a foreign corporation, found in *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357. It said of that statement:

"The general language of the learned justice is to be expounded with reference to the judgment before him."

Speaking of the case of *Paul v. Virginia*, it declared that:

"It had no reference to the clause giving to citizens of other states the right of litigation in the United States courts, and certainly had no bearing upon the right of corporations to resort to those courts, or the power of the state to limit and restrict such resort."

Discussing the question upon its merits, the opinion proceeded in this way:

"The Constitution of the United States declares that the judicial power of the United States shall extend to all cases in law and equity arising under that Constitution, the laws of the United States, and to the treaties made or which shall be made under their authority, * * * and to controversies between a state and citizens of another state and between citizens of different states. The jurisdiction of the federal courts under this clause of the Constitution depends upon and is regulated by the laws of the United States. State legislation cannot confer jurisdiction upon the federal courts, nor can it limit or restrict the authority given by Congress in pursuance of the Constitution. This has been held many times. *Railway Company v. Whitton*, 13 Wall. 270, 20 L. Ed. 571; *Payne v. Hook*, 7 Wall. 427, 19 L. Ed. 260; *The Moses Taylor*, 4 Wall. 411, 18 L. Ed. 397, and cases cited. It has also been held many times that a corporation is a citizen of the state by which it is created and in which its principal place of business is situate, so far as that it can sue and be sued in the federal courts. This court has repeatedly held that a corporation was a citizen of the state creating it, within the clause of the Constitution

extending the jurisdiction of the federal courts to citizens of different states." 20 Wall. 453, 22 L. Ed. 365.

The Supreme Court reversed the judgment below, and held (1) that the Constitution of the United States secured to corporations of other states the absolute right to remove their cases into the federal courts upon compliance with the national statutes, and (2) that the statute of Wisconsin was an obstruction to that right, was repugnant to the Constitution of the United States and the laws in pursuance thereof, and was illegal and void.

The question arose again in *Barron v. Burnside*, 121 U. S. 186, 200, 7 Sup. Ct. 931, 936, 30 L. Ed. 915, and the former decision was affirmed. The court said:

"As the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States, the statute requiring the permit must be held to be void. * * * In all the cases in which this court has considered the subject of the granting by a state to a foreign corporation of its consent to the transaction of business in the state, it has uniformly asserted that no conditions can be imposed by the state which are repugnant to the Constitution and laws of the United States."

The review of the decisions of the Supreme Court relating to the power of a state to trammel or destroy the right of a corporation of another state to do business within its borders in which we have indulged may have been tedious; but it may be profitable, if it serve to correct the erroneous view that such a corporation has no such right, and that all its powers and privileges without the limits of the state of its creation are at the mercy of any state in which it attempts to do business. It is not now, and it never has been, the law that no corporation of one state has any absolute right of recognition in other states, or that other states may exclude all the corporations of any state from doing any business within them, or that they may condition their transaction of such business by such terms as they may think proper to impose.

The Constitution of the United States and the acts of Congress in pursuance thereof are the supreme law of the land. Under that Constitution and those laws a corporation of one state has at least three absolute rights which it may freely exercise in every other state in the Union, without let or hindrance from its legislation, or action:

(1) Every corporation, empowered to engage in interstate commerce by the state in which it is created, may carry on interstate commerce in every state in the Union, free of every prohibition and condition imposed by the latter. *Pensacola Telegraph Company v. Western Union Telegraph Company*, 96 U. S. 1, 8, 24 L. Ed. 708; *Cooper Manufacturing Company v. Ferguson*, 113 U. S. 727, 736, 737, 5 Sup. Ct. 739, 28 L. Ed. 1137; *Pembina Silver Mining Company v. Pennsylvania*, 125 U. S. 181, 190, 8 Sup. Ct. 737, 31 L. Ed. 650; *Lyng v. Michigan*, 135 U. S. 161, 166, 10 Sup. Ct. 725, 34 L. Ed. 150; *Norfolk, etc., Ry. Co. v. Pennsylvania*, 136 U. S. 114, 115, 118, 120, 10 Sup. Ct. 958, 34 L. Ed. 394; *Crutcher v. Kentucky*, 141 U. S. 47, 57, 59, 11 Sup. Ct. 851, 35 L. Ed. 649; *Horn Silver Mining Company v. New York*, 143 U. S. 305, 315, 12 Sup. Ct. 403, 36 L.

Ed. 164; *Osborne v. Florida*, 164 U. S. 650, 655, 656, 17 Sup. Ct. 214, 41 L. Ed. 586; *Missouri, K. & T. Trust Co. v. Krumseig*, 172 U. S. 351, 19 Sup. Ct. 179, 43 L. Ed. 474; *Caldwell v. North Carolina*, 187 U. S. 622, 623, 23 Sup. Ct. 229, 47 L. Ed. 336.

(2) Every corporation of any state in the employ of the United States has the right to exercise the necessary corporate powers and to transact the business requisite to discharge the duties of that employment in every other state in the Union without permission granted, or conditions imposed by the latter. *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, 186, 8 Sup. Ct. 737, 31 L. Ed. 650; *Horn Silver Mining Co. v. New York*, 143 U. S. 305, 315, 12 Sup. Ct. 403, 36 L. Ed. 164.

(3) Every corporation of each state has the absolute right to institute and maintain in the federal courts, and to remove to those courts for trial and decision, its suits in every other state, in the cases and on the terms prescribed by the acts of Congress. *Insurance Company v. Morse*, 87 U. S. 445, 453, 456, 22 L. Ed. 365; *Barron v. Burnside*, 121 U. S. 186, 200, 7 Sup. Ct. 931, 30 L. Ed. 915.

Every law of a state which attempts to destroy these rights or to burden their exercise is violative of the Constitution of the United States and void. The Constitution and statutes of Colorado prohibit every foreign corporation from doing business and from exercising any corporate power in that state until it pays the fees and the annual license tax and complies with the other requirements of its statutes. The result is that in so far as this Constitution and these statutes forbid or obstruct the exercise by a foreign corporation of its right to use the necessary corporate powers to carry on interstate commerce and to maintain and defend its suits in the federal courts, they are repugnant to the Constitution and laws of the nation and ineffective.

We come, then, to the question: Were the contracts in suit transactions of interstate commerce? The contract of January, 1903, was made in New York, and that of October, 1903, in Colorado; but the place of their execution is immaterial here, because the right of the rubber company was as absolute to make and to perform a contract of interstate commerce in Colorado as in New Jersey.

The contention that the rubber goods ceased to be articles of interstate commerce, and became a part of the mass of the property in the state, upon their delivery to the consignee, is likewise immaterial. The soundness of this contention is not conceded. But, if it were, neither that concession nor the numerous authorities upon the taxation of property in the state would be either decisive or persuasive here, for the question is, not whether or not the goods were taxable within the state, but whether or not the state could lawfully prohibit their importation and annul all contracts therefor. If a part of the goods or of the business of the rubber company has been or is within the state of Colorado, there are adequate methods of taxing it, without restraining or prohibiting its interstate commerce, and that fact furnishes no support for such a prohibition. *Le Loup v. Port of Mobile*, 127 U. S. 640, 647, 8 Sup. Ct. 1380, 32 L. Ed. 311; *Crutcher v. Kentucky*, 141 U. S. 47, 59, 11 Sup. Ct. 851, 35 L. Ed. 649.

Nor is the fact that these contracts did not evidence sales of the goods determinative of this question. A sale is not the test of interstate commerce. All sales of sound articles of commerce, which necessitate the transportation of the goods sold from one state to another, are interstate commerce; but all interstate commerce is not sales of goods. Importation into one state from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade, and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce. "Since the case of *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23," said Chief Justice Waite in *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 8, 24 L. Ed. 708, "it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress." The contracts before us constituted and caused commercial intercourse between citizens of different states. Their chief purpose and their principal effect were the importation of sound articles of commerce into the state of Colorado from other states, and they necessarily constituted transactions of interstate commerce. *Caldwell v. North Carolina*, 187 U. S. 622, 629, 23 Sup. Ct. 229, 47 L. Ed. 336; *Wagner v. Meakin*, 92 Fed. 76, 33 C. C. A. 577, 581, 584; *Allen v. Tyson-Jones Buggy Co.*, 91 Tex. 22, 40 S. W. 393, 714; *Chattanooga R. & C. R. Co. v. Evans*, 66 Fed. 809, 814, 14 C. C. A. 116; *Gunn v. White Sewing Machine Co.*, 57 Ark. 24, 20 S. W. 591, 18 L. R. A. 206, 38 Am. St. Rep. 223; *Keating Implement & Machine Co. v. Favorite Carriage Co.*, 12 Tex. Civ. App. 666, 35 S. W. 417. The decision of the Supreme Court of Kentucky to the contrary in *Commonwealth v. Parlin & Orendorff Co.*, 118 Ky. 168, 80 S. W. 791, has been thoughtfully read, but it does not commend itself to our judgment.

As the contracts were transactions of interstate commerce, any prohibition or obstruction to the making of them, or to the enforcement of them in the national courts, by the legislation or action of the state of Colorado, was beyond the power of the state and futile. Where the Congress has passed no law regulating interstate commerce in well-recognized articles of commerce, that fact is conclusive evidence that it intends such commerce to be free, and any law of a state which prohibits or restrains it at all is unconstitutional and void. *Caldwell v. North Carolina*, 187 U. S. 622, 629, 23 Sup. Ct. 229, 47 L. Ed. 336; *Brown v. Houston*, 114 U. S. 622, 631, 5 Sup. Ct. 1091, 29 L. Ed. 257; *Bowerman v. Rogers*, 125 U. S. 585, 587, 8 Sup. Ct. 986, 31 L. Ed. 815; *Walling v. Michigan*, 116 U. S. 455, 456, 6 Sup. Ct. 454, 29 L. Ed. 691; *Welton v. The State of Missouri*, 91 U. S. 275, 282, 23 L. Ed. 347; *State Freight Tax*, 15 Wall. 232, 21 L. Ed. 146; *Brennan v. Titusville*, 153 U. S. 289, 302, 14 Sup. Ct. 829, 38 L. Ed. 719; *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 493, 7 Sup. Ct. 592, 30 L. Ed. 694; *Le Loup v. Mobile*, 127 U. S. 640, 647, 648, 8 Sup. Ct. 1380, 32 L. Ed. 311; *Lyng v. Michigan*, 135 U. S. 161, 166, 10 Sup. Ct. 725, 34 L. Ed. 150; *Leisy v. Hardin*, 135 U. S. 100, 119, 10 Sup. Ct. 681, 34 L. Ed. 128.

The declaration of the Colorado statute that the fact that a foreign corporation has been doing business in the state without its license shall constitute an absolute defense to any action arising out of such business is ineffectual to restrain or modify the power or duty of the national courts to hear and decide the controversies of such corporations arising from its transactions of interstate commerce according to the very right of the matter. A Circuit Court of the United States may administer a new right or remedy granted by the statute of a state to its citizens according to the terms of that statute. *Missouri, K. & T. Trust Co. v. Krumseig*, 172 U. S. 351, 19 Sup. Ct. 179, 43 L. Ed. 474; *National Surety Co. v. State Bank*, 120 Fed. 593, 603, 56 C. C. A. 657, 61 L. R. A. 394; *Barber Asphalt Paving Co. v. Morris*, 132 Fed. 945, 949, 66 C. C. A. 55, 67 L. R. A. 761. But the power of the Circuit Courts of the United States to administer rights and remedies in equity was vested in them as part of the judicial power of the nation under the Constitution of the United States and the judiciary act of 1789, and as it was not granted by, it may not be revoked, impaired, or destroyed by, the legislation or act of any state. *Payne v. Hook*, 7 Wall. 425, 430, 19 L. Ed. 260; *Green's Adm'x v. Creighton*, 23 How. 90, 105, 16 L. Ed. 419; *Insurance Co. v. Morse*, 87 U. S. 445, 458, 22 L. Ed. 365; *Suydam v. Broadnax*, 14 Pet. 66, 74, 10 L. Ed. 357; *Union Bank of Tennessee v. Jolly's Adm'rs*, 18 How. 503, 507, 15 L. Ed. 472; *Hyde v. Stone*, 20 How. 170, 175, 15 L. Ed. 874; *Blodgett v. Lanyon Zinc Co.*, 120 Fed. 893, 897, 898, 58 C. C. A. 79; *National Surety Co. v. State Bank*, 120 Fed. 593, 603, 56 C. C. A. 657, 61 L. R. A. 394; *Hervey v. Illinois Midland Co. (C. C.)* 28 Fed. 169, 175; *Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co. (C. C.)* 68 Fed. 412, 417; *Sullivan v. Beck (C. C.)* 79 Fed. 200, 202; *Jarvis-Conklin Mtg. Trust Co. v. Willhoit (C. C.)* 84 Fed. 514, 517; *Eastern B. & L. Ass'n v. Bedford (C. C.)* 88 Fed. 7, 12. The unavoidable result is that, if the Constitution and statutes of Colorado are to be interpreted to mean, as they clearly read, to prohibit every foreign corporation from exercising any corporate power whatever, or doing any business whatever, in the state, unless they pay the fees and the annual license tax which this legislation requires as a condition thereof, they are unconstitutional and void, so far as they apply to interstate commerce conducted by foreign corporations or suits for and against them in the national courts.

There is, however, another view of this case which is both reasonable and persuasive. The law upon the subject which has been considered was the same when the Colorado Constitution was adopted and when her statutes were enacted that it is to-day, and the legal presumption, in the absence of persuasive evidence of another purpose, is that the people and the Legislature of that state intended in the adoption of this Constitution and the enactment of these laws to obey the supreme law of the land, that they intended to prohibit the doing of intrastate business only, and the exercise by foreign corporations of corporate power unauthorized by the Constitution and laws of the United States, and that only, without a license from their state. Hence this Constitution and these statutes should be read and interpreted, if possible, in the light of this presumption, so that they will not conflict

with the Constitution and the laws of the United States. The Supreme Court seems to have been inclined to a liberal interpretation of this nature, for in *Fritts v. Palmer*, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317, the foreign corporation had clearly violated the plain terms of the Colorado statute. It had exercised corporate power in that state. It had acquired, held, and conveyed real estate in violation of the legislation of that state, and yet the court sustained the title. The Supreme Court of Colorado construed this legislation in this rational spirit when it held that a single act of business did not come within the purview of some of these statutes (*Kindel v. Lithographing Co.*, 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311; *Roseberry v. Valley Building & Loan Ass'n*, 83 Pac. 637), although by their express terms they prohibited a single exercise of corporate power and a single act of business as imperatively as they forbade many. An interpretation of this legislation so that it may conform to the national law, and so that acts done in undoubted violation of its plain terms may be held to be without its true meaning and purpose, is rational and just, and it is supported by high authority. *Harris v. Runnels*, 12 How. 79, 84, 13 L. Ed. 901; *National Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188; *Coit v. Sutton*, 102 Mich. 324, 60 N. W. 690, 25 L. R. A. 819; *Oakland Sugar Mill Co. v. Fred W. Wolf Co.*, 118 Fed. 239, 243, 55 C. C. A. 93; *Watrous & Snouffer v. Blair*, 32 Iowa, 58; *Pangborn v. Westlake*, 36 Iowa, 546, 548; *Chattanooga, R. & C. R. Co. v. Evans*, 66 Fed. 809, 815, 816, 14 C. C. A. 116, 121, 122.

Let us now turn to the contracts, observe what the rubber company agreed to do and what it actually did under them, and determine, if possible, whether or not in making or in performing these agreements it was guilty of doing any business within the meaning of the Constitution and statutes of Colorado. It agreed to ship the goods from its warehouse, or its mill, upon the orders of the appellee, to that company in Denver: and it did so. It contracted to do, and it did, nothing more. It never had any office or place of business in Colorado. It never received, stored, handled, or sold any goods, or collected any money for the sales of any goods, in that state under this contract. It never incurred, assumed, or paid any expenses of doing all these things, or of conducting any of the business. The shoe company had and maintained a place of business in Colorado, it rented or owned the place in which the business in Colorado was done, and it agreed to bear all the expenses and losses of receiving, storing, and selling the goods; and it did so. The purchasers of the goods were purchasers from it, solicited and secured by it. They were its customers, and liable to it for the purchase price of the goods. The goods were billed to them in the name of the shoe company as consignee. The profits of the business and the work of the business, the labor of receiving, storing, and selling the goods, were the shoe company's. The profits constituted its factorage, its compensation, for carrying on the business. There is no question here between the state and the shoe company, or between the shoe company and the purchasers of the goods, or between the rubber company and the purchasers of the goods. The question here is between the consignor and the factor, and it is whether the consignor, which did not agree to do, and did not in fact, do the business of receiving, storing, and

selling these goods, or the factor who did contract to do, and did actually do, the business of receiving, storing, and selling these goods, in Colorado, and who received the factorage therefor, was doing that business. In a simple transaction the true answer seems clear. A farmer sends to a commission merchant in a city a dozen barrels of apples for him to sell. The factor puts them in his store, sells them, receives the proceeds, and remits them, less his factorage. The farmer from time to time sends 1,000 barrels during the season, and they are sold and the proceeds are remitted in the same way. The farmer is not carrying on the business of selling apples in the city, but the factor is. The transaction in hand is larger, but in every element which conditions its legal character and effect it is not different. The transaction between the parties to this suit was interstate commerce. The rubber company did not agree to do, and did not actually do, any of the business of receiving, storing, and selling the goods in Colorado. The shoe company did agree to do, and did do, that business. These facts have driven our minds with compelling force to the conclusion that, within the true intent and meaning of the Constitution and statutes of Colorado, the rubber company was not doing business in that state, and the contracts between these litigants are valid and enforceable.

Many authorities have been examined which relate in some degree to the question which has now been decided. They are numerous, various, and conflicting, and any attempt to reconcile them must fail. The reasons for the conclusion reached have been stated, and some of the authorities examined are here cited for reference: *Nutter v. Wheeler*, 2 Lowell, 346, 18 Fed. Cas. 497; *In re Hovey's Estate*, 198 Pa. 385, 48 Atl. 311, 315; *Chattanooga, R. & C. R. Co. v. Evans*, 66 Fed. 809, 815, 816, 14 C. C. A. 116, 121, 122; *Allen et al. v. Tyson-Jones Buggy Co.*, 91 Tex. 22, 40 S. W. 393, 714; *Keating Implement & Machine Co. v. Favorite Carriage Co.*, 12 Tex. Civ. App. 666, 35 S. W. 417; *Gunn v. White Sewing Machine Co.*, 57 Ark. 24, 20 S. W. 591, 18 L. R. A. 206, 38 Am. St. Rep. 223; *Bertha Zinc & Mineral Co. v. Clute*, 27 N. Y. Supp. 342, 7 Misc. Rep. 123; *U. S. v. American Bell Teleph. Co.* (C. C.) 29 Fed. 17, 40; *Wolff Dryer v. Bigler*, 192 Pa. 466, 43 Atl. 1092; *Ammons v. Brunswick Co.*, 141 Fed. 570, 575, 72 C. C. A. 614; *Blodgett v. Lanyon Zinc Co.*, 120 Fed. 893, 58 C. C. A. 79; *Iowa Lilloet Gold Mining Co. v. U. S. F. & G. Co.* (C. C.) 146 Fed. 437; *Osborne & Co. v. Josselyn*, 92 Minn. 267, 99 N. W. 890; *Davis & Rankin Building, etc., Co. v. Caigle* (Tenn. Ch. App.) 53 S. W. 240; *Southern Cotton Oil Co. v. Wemple* (C. C.) 44 Fed. 24; *People ex rel. v. Wemple*, 131 N. Y. 64, 69, 29 N. E. 1002, 27 Am. St. Rep. 542; *Chicago M. & L. Co. v. Sims*, 101 Mo. App. 569, 74 S. W. 128; *Fertilizer Co. v. Kelly*, 10 Pa. Super. Ct. 565; *Elliott v. Parlin & Orendorff Co.*, 71 Kan. 665, 81 Pac. 500, 502; *John Deere Plow Co. v. Wyland*, 69 Kan. 255, 76 Pac. 863; *D. M. Osborne & Co. v. Shilling* (Kan.) 88 Pac. 258; *Pennsylvania L. M. Fire Ins. Co. v. Meyer*, 197 U. S. 407, 415, 25 Sup. Ct. 483, 49 L. Ed. 810; *Commonwealth v. Parlin & Orendorff Co.*, 118 Ky. 168, 80 S. W. 791; *New Haven Pulp & Board Co. v. Downingtown Mfg. Co.* (C. C.) 130 Fed. 605; *Wilson Moline Buggy Co. v. Priebe* (Mo. App.) 100 S. W. 558; *Pittsburgh Const. Co. v. West Side Belt R. Co.* (C. C.) 151 Fed. 125; *Brewing*

Co. v. Peimeisl, 85 Minn. 121, 88 N. W. 441; Nursery Co. v. Aughenbaugh, 93 Minn. 201, 100 N. W. 1101; Thomas Mfg. Co. v. Knapp (Minn.) 112 N. W. 989.

Finally, counsel for the shoe company argue that the decree should be reversed and the bill dismissed because the complainant had an adequate remedy at law. The adequate remedy at law which will deprive a federal court of jurisdiction in equity must be as certain, practical, prompt, efficient, and complete as the remedy in equity. *Boyce's Executors v. Grundy*, 3 Pet. 210, 215, 7 L. Ed. 655; *Castle Creek Water Co. v. City of Aspen*, 146 Fed. 8, 14, 76 C. C. A. 516. The relief which the complainant sought was the immediate possession and ultimate recovery of the goods in the hands of the defendant which subsequently realized \$29,647.09, the recovery from the bank of the \$8,276.47 which it owed upon the "Butler Bros. Shoe Company Consignee Account," and the recovery from the shoe company of the \$14,856.27 which it owed on account of the goods it had sold. The shoe company denied by its answer that the complainant was entitled to any of this relief. To obtain such relief at law an action of replevin and of assumpsit against the defendant, and an action against the bank, would have been necessary, and the remedy by two or three actions at law might not have been as prompt and efficient as a single suit in equity. In order to determine the issues presented by the pleadings it was necessary to take and state an account of many items, to the end that the quantities and selling prices of the goods which the defendant had sold and the amounts due to the complainant therefor might be determined. No action at law furnishes as efficient, practical, or adequate a remedy for the decision of such a controversy as a suit in a court of equity, which, with its deliberate methods, its power to select men trained in the science of accounting to take the evidence and state the result, its authority to consider and modify their reports after exceptions and hearings, is alone really competent to justly determine such an issue. *Gunn v. Brinkley Car Works & Mfg. Co.*, 66 Fed. 382, 384, 13 C. C. A. 529, 531; *Hayden v. Thompson*, 71 Fed. 60, 64, 17 C. C. A. 592, 595; *Fechteler v. Palm Bros. & Co.*, 133 Fed. 462, 465, 66 C. C. A. 336; *M'Mullen Lumber Co. v. Strother*, 136 Fed. 295, 303, 304, 69 C. C. A. 433.

The complainant had no adequate remedy at law, and the decree below must be affirmed.

It is so ordered.

(156 Fed. 21.)

NATIONAL SURETY CO. V. STATE SAVINGS BANK.

(Circuit Court of Appeals, Eighth Circuit. June 18, 1907.)

No. 2,478.

1. COUNTIES—DEPUTY AUDITOR—LIABILITY ON OFFICIAL BONDS—MISCONDUCT IN OFFICE.

A deputy county auditor in Minnesota, authorized by law to act in the name of his principal and for whose official acts the auditor and his bondsmen were responsible, not only to the county, but to any person injured by his "misconduct in office" (Gen. St. Minn. 1894, §§ 710, 5951), issued

spurious refund orders on the county treasurer in favor of fictitious payees, purporting to be for the refunding of taxes received through redemption from tax sales. He procured the orders to be authenticated by the chairman of the board of county commissioners, forged the names of the fictitious payees to assignments thereof, and sold the same to a bank. *Held*, that any loss sustained by the bank through its purchase of the orders could not be attributed to the official misconduct of the deputy in issuing the same, but that its proximate cause was his individual acts in forging the assignments and selling the orders as genuine; that, the orders being nonnegotiable, the bank was put on inquiry, and acquired no greater rights than the supposed payees, and had no claim to recover any such loss, either from the county or the surety on the auditor's bond.

2. SUBROGATION—PAYMENT OF DEBT BY SURETY.

A year after the issuance of such orders they were presented to the county treasurer and paid, with interest. Upon the discovery of their fraudulent character the county brought suit against the auditor on his bond, and by the final judgment of the Supreme Court of the state recovered a judgment, which was paid by the surety. *Held*, that the bank was primarily liable to the county for the amount received from its treasurer as money had and received to the county's use, and that the surety of the auditor, having paid the debt to the county, was entitled by equitable subrogation to enforce its right of recovery against the bank.

3. SAME—SCOPE OF DOCTRINE—RIGHTS OF SURETY.

Subrogation is not a matter of strict right, but is purely equitable in its nature, dependent upon the facts and circumstances in each particular case, and intended to serve the purpose of compelling the ultimate discharge of a debt or obligation by him who in good conscience ought to pay it. The doctrine is sufficiently broad to entitle a surety who has paid the debt of his principal to the remedies which the creditor had, not only against the principal, but against others.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Subrogation, §§ 17, 18.]

Hook, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the District of Minnesota.

W. B. Bourne having been duly appointed deputy auditor of Ramsey county, Minn., by W. R. Johnson, the auditor, and being as such authorized to sign all papers and do all other things that the auditor himself might do, purporting to act by authority of the statute of that state providing for refunding to the holders of invalid certificates of sale for nonpayment of taxes the amounts paid by them therefor, drew seven spurious refunding orders, some purporting to be in favor of William Mannering, a fictitious person, and some purporting to be in favor of E. J. Trowbridge, another fictitious person, upon the treasurer of the county, requiring him to refund to those fictitious persons the different sums specified in each order, which aggregated in all \$7,352.49. Bourne in some way procured the chairman of the board of county commissioners to authenticate the orders as genuine. They did not purport to be negotiable or transferable. One of them, which may be referred to as a sample of all, is in the following words:

"Treasurer of Ramsey County, Minnesota:

"Refund to William Mannering, the sum of fifteen hundred and $54/100$ dollars as follows: [Here appears a description of the lands against which the taxes purported to have been assessed and a statement of several particulars, including the amount assessed against each tract, the penalties, costs, etc.]—being tax refunded. Sec. 1697, Laws of 1894.

"[Signed] W. R. Johnson, Auditor of Ramsey County, Minn.

"Per W. B. Bourne, Deputy.

"By order of Board of Co. Com.

"[Signed]

A. R. Kiefer, Chairman."

The deputy sold the fictitious orders, with an assignment on the back of each of them, signed by him in the names of the myths to whom they were payable, to the State Savings Bank, for their full face value, which was, in a way unnecessary now to state, paid to him. They bore interest at the rate of 7 per cent. per annum. The bank held them for about a year, then presented them to the county treasurer for payment, and received from him their full face value, with accrued interest, amounting to \$7,866. Thereafter, on discovering the fraud perpetrated upon it, the county instituted its suit against the National Surety Company, surety on the auditor's official bond, and recovered judgment for the amount paid the State Savings Bank. After paying the judgment the surety company filed its bill in the court below to be subrogated to the rights of Ramsey county against the State Savings Bank and to recover the amount it had been required to pay as surety for the auditor. From an order sustaining a demurrer to the bill, and dismissing the same, the surety company prosecutes its appeal to this court.

Edmund S. Durment (Albert R. Moore and W. J. Griffin, on the brief), for appellant.

John D. O'Brien, for appellee.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge (after stating the facts as above). The bank purchased nonnegotiable orders or drafts upon the county treasurer, payable to fictitious persons, and by them apparently assigned to it. The orders being nonnegotiable, the bank acquired no greater right to them than its assignors had. The assignors being fictitious persons, and the orders themselves without consideration, fraudulent, and void, the assignee acquired no right against the county. When it presented the orders to the treasurer for payment, and secured payment thereof, it received moneys of the county without consideration, and unquestionably thereby became liable to the county for money had and received to its use. The surety company, as surety for the auditor, whose official misconduct, through the act of his deputy, subjected it to liability (*Board of Co. Com'rs v. Sullivan*, 89 Minn. 68, 93 N. W. 1056), having restored to the county the amount of its loss, now claims to be subrogated to the county's right of action against the bank to recover from the latter the amount paid by it to the county. Can this be done? The bank places some reliance, in denying the claim of the surety company, upon section 5951, Gen. St. Minn. 1894, which reads as follows:

"The official bond or other security of a public officer to the state or any municipal body or corporation, whether with or without sureties, is to be construed as security to all persons severally for the official delinquencies against which it is intended to provide as well as to the state, body or corporation designated therein."

This section is in *pari materia* with section 710 of the same Statutes. The latter reads as follows:

"An action may be brought against the county auditor and his sureties in the name of the state of Minnesota and for its use or for the use of any county or person injured by the misconduct in office of the auditor or by the omission of any duty required of him by law."

These sections of the statute must be read into and treated as a part of every official bond contemplated by them. Accordingly, if the bank had been injured by reason of its purchase of the orders from Bourne, and that injury had been occasioned by Bourne's official delinquency or

misconduct in office, it might have recovered its loss from the surety company. If, by virtue of these statutes, the bank could have recovered from the surety company, as a matter of course the surety company cannot now recover from the bank.

We are therefore to inquire whether, if the bank had failed to secure payment of its refunding orders from the county treasurer, its loss or injury would have been so produced by the misconduct in office of Deputy Auditor Bourne as to subject the surety of the auditor to liability for it. It is true the bank could not have lost any money, or could not have been injured, if Bourne had not in his official capacity signed the spurious refunding orders. That act, being performed in the line of his official duty, was a misconduct in office, within the meaning of the statutes referred to; but the question still remains whether it or some other cause produced the bank's assumed injury.

The misconduct of Bourne in much of what he actually did and in what was necessarily involved, namely, in falsely representing to the bank that the orders were genuine, that the payees had paid money to the county treasurer for taxes, and were entitled under the law to an order refunding the amount so paid, that they were actual persons, instead of myths, and his further misconduct in fraudulently signing the mythical names to the assignments, in negotiating with the bank, and wrongfully securing its money, were altogether personal in their character. They were in no sense representative or official. No duty arising out of his official relation required him to make any of the representations or commit any of the crimes just alluded to. On the contrary, the nonnegotiability of the orders, and possibly the intervention and activity of Bourne, as shown by the bill, should have attracted the attention of the bank, and warned it against purchasing the orders without making diligent inquiry concerning their validity. Bourne's personal representations and acts were well adapted to be the effective cause of the bank's injury, and, giving to the original official misconduct its natural force and effect only, were, in our opinion, the direct moving cause of the injury, without which it could not have occurred. They did not in a mere incidental and subordinate way work out the natural and probable consequences of the original official misconduct, but were, as between the deputy and the bank, the proximate and all-sufficient cause of the latter's injury. An act is the proximate cause of those results only which are its natural and probable consequences, and which ought to have been foreseen in the light of the attending circumstances. *Milwaukee, etc., Railway Co. v. Kellogg*, 94 U. S. 469, 474, 24 L. Ed. 256; *Travelers' Ins. Co. v. Melick*, 12 C. C. A. 544, 65 Fed. 178, 184, 185, 27 L. R. A. 629; *Citizens' Gas & Electric Co. v. Nicholson*, 81 C. C. A. 515, 152 Fed. 389, and cases cited. Within the fair and reasonable meaning of the bond and statutes in question, Bourne's personal, as distinguished from official, acts caused the assumed injury which the bank sustained.

But it is urged that the Supreme Court of Minnesota in *Board of Com'rs v. Sullivan*, supra, sustained a recovery by the county against the surety company for its loss made in paying the forged orders on the ground that Bourne's wrongful acts constituted "misconduct in of-

fice," within the meaning of the Statutes of Minnesota, and that the same rule of law would have been applicable if the bank had sued the surety company for its assumed loss. We cannot agree to this. The orders in question were apparently lawfully drawn, lawfully countersigned, and genuine. The natural and probable consequence of their issue was their presentation to the treasurer, to whom they were addressed, and payment of them by him. The statutes of the state made it his duty to pay authorized orders of that kind. The surety company was liable to the county, because the presentation to the treasurer and the payment of the orders by him were the natural and probable consequence of their issue, and might have been reasonably anticipated by any prudent person. Right here is the radical and decisive difference between the position of the county and that of the bank. While the payment by the county was, in the ordinary course of business, reasonable and probable, the purchase of the orders by the bank on the assignments made in the name of myths by Bourne was not the natural or probable consequence of their issue. No one could have reasonably anticipated that a bank or any rational person would disregard the law which makes a nonnegotiable chose in action in the hands of an assignee subject to every defense existing in favor of the maker against the assignor, purchase a nonnegotiable order of the kind in question, and pay the purchase price thereof to one who was not the payee named therein, without inquiring into the genuineness of the assignment and the genuineness of its execution. Such a purchase would be out of the ordinary course of business, unnatural, improbable, incapable of anticipation, and in no legal sense the natural and probable consequence of the issue of the orders. For these reasons the purchase by the bank cannot be held to have so resulted from the "misconduct in office" of Bourne as to subject the surety company to liability to the bank for any loss it might have sustained by reason of its purchase.

Again, it is elementary that no liability could exist in favor of the bank against the surety on the bond of the auditor, unless it existed against the principal in the bond, the auditor himself, or the county of Ramsey, for which he was acting. If any argument is necessary to demonstrate that the bank never could have recovered its loss from the auditor himself, the following observations will be sufficient: The bank purchased nonnegotiable refunding orders, made nonnegotiable obviously for the purpose of preventing fraudulent practices and fraudulent dealings with them, and took them by assignment of the rights of the supposed payees. All it got by such assignment was the right which the supposed payees themselves had; and that, according to the undisputed facts in this case, was nothing. The bank took them subject to all the equities existing between the supposed payees and the auditor, or the county, whom the auditor represented; and those equities, according to the undisputed facts of the case, were unquestionably sufficient to defeat any claim of the bank against either of them. Taking an assignment of nonnegotiable securities, it was bound to inquire, not only whether all steps had been taken to create a legal liability against the county, but also as to the genuineness of the assignment of the right of the original payees. If such inquiry had been made

at the places and of the officers plainly suggested on the face of the securities themselves, the bank would have unquestionably learned the fact that they were bogus and fraudulent, and saved itself from any possible loss. In such circumstances failure to make inquiry was culpable negligence. In no view, therefore, could the bank, by virtue of the statutes referred to, have maintained an action against the surety company, which incurred no greater liability than the principal in the bond, to recover its loss, if the county treasurer had not honored and paid the orders.

Having now disposed of the proposition that defendant is not protected by the Minnesota Statutes relied on, we are brought to the meritorious equitable question in the case, whether the surety company, which, as surety for the auditor, paid the county the amount of its loss, is entitled to be subrogated to the rights of the county against the bank, which improperly received its money and occasioned its loss. Subrogation is not a matter of strict right, but is purely equitable in its nature, dependent upon the facts and circumstances of each particular case, and intended to serve the purpose of compelling the ultimate discharge of a debt or obligation by him who, in good conscience, ought to pay it. *American Bonding Co. v. National Mechanics' Bank*, 97 Md. 598, 55 Atl. 395 (see note to same case in 99 Am. St. R. 474); *Crippen v. Chappel*, 35 Kan. 495, 499, 11 Pac. 453, 57 Am. Rep. 187; *Barnes v. Mott*, 64 N. Y. 397, 401, 21 Am. Rep. 625; *Arnold v. Green*, 116 N. Y. 566, 571, 23 N. E. 1; *McCormick's Adm'r v. Irwin*, 35 Pa. 111. The bank had a fund in its possession, so obtained from the county that it became liable to the latter as for money had and received to its use. Most naturally the county, when it found its money was gone, should have proceeded against the person or persons who had it, and thus simply have retaken its own; but, instead of doing so, it resorted to and recovered from the surety company on its contract of indemnity. Had the county, upon receipt of its money from the surety company, assigned its claim against the bank which had the lost money (a thing which equity and good conscience certainly would have approved, if not required), no one could doubt the right of the surety company to recover on the claim so assigned; and, inasmuch as in equity and fair dealing such an assignment should have been made, we cannot doubt the justice and equity of treating that done which ought to have been done. Subrogation is nothing more than an equitable assignment. When equity and good conscience requires the assignment to be made, subrogation, if necessary, will be allowed.

The general proposition that a surety, upon paying to a creditor the debt of his principal, is entitled to be subrogated to all the rights of the creditor against the principal, and to the benefit of all securities for the debt held by the principal, is universally acknowledged. According to this doctrine the surety company in the present case could have proceeded against the auditor to enforce any rights or securities held by the county against him. But the question now is whether its rights can be extended beyond the general rule, and it be subrogated to a claim and cause of action which the county had against the bank for appropriating the money which made the surety company liable to

the county. However limited the right of subrogation originally was, the remedy now has been so broadened that it has been called—

"the mode which equity adopts to compel the ultimate payment of a debt by one who in equity, justice, and good conscience should pay it." *Arnold v. Green*, 116 N. Y. 566, 571, 23 N. E. 1, and cases cited.

In Baylies on Sureties and Guarantors, p. 358, it is said:

"The right of subrogation to the remedies of the creditor on payment of the debt of the principal is not restricted to the remedies which the creditor had as against the principal, but extends to all the remedies which he had against the principal and others liable for the debt."

In the case of *Lidderdale v. Robinson*, 12 Wheat. 594, 6 L. Ed. 740, the Supreme Court, after referring to the principle that a court of equity lends its aid to compel a creditor to assign a cause of action which it has against a third person to sureties who have paid the debt of their principal, says:

"This fully affirms the right to succeed to the legal standing of their principal; and, after establishing that principle, it is going but one step farther to consider that as done which the surety has a right to have done in his favor, and thus to sustain the substitution, without an actual assignment."

In *Rooker v. Benson*, 83 Ind. 250, 255, the doctrine as announced by Baylies (*supra*) is held to be the law.

In *Fox v. Alexander*, 1 Ired. Eq. (N. C.) 340, it is held that a surety of a guardian, who pays a debt of the guardian to the ward, stands in the shoes of the ward, and may follow the trust fund wherever it goes.

In *Blake v. Traders' Bank*, 145 Mass. 13, 12 N. E. 414, the facts are that a trustee pledged to a bank certain shares of stock belonging to a trust estate as security for the payment of his individual debt to the bank. The bank, or its successor, afterwards sold the shares and applied the proceeds on the debt of the trustee. The bank knew, or could have known from an inspection of the papers, that the shares were held by its debtor as trustee. A surety on the trustee's bond was compelled to pay to the trust estate the value of the stock converted by the bank. It was held that the surety was subrogated to the rights of the trust estate and could maintain a bill in equity against the bank to recover the amount paid by him. The court in its opinion, among other things, said:

"In this case the defendant and the surety were both liable to the trustees for the amount of the trust property—the former, in consequence of participating in the wrongful act of the first trustee; and the latter, by his contract to indemnify the estate against such act. The cases are analogous where one owner of property has claims for a loss against an insurer and a tortfeasor. The insurer is in the nature of a surety, and, upon paying the loss, he is subrogated to the rights of the owner to recover for the tort"—citing *Hart v. Western Railroad*, 13 Metc. (Mass.) 99, 46 Am. Dec. 719; *Clark v. Wilson*, 103 Mass. 219, 4 Am. Rep. 532; *Mercantile Ins. Co. v. Clark*, 118 Mass. 288.

See to the same effect, *Sheldon on Subrogation*, § 89.

It is said in *American Bonding Co. v. National Mechanics' Bank*, 7 Md. 599, 606, 55 Atl. 395, 397, 99 Am. St. Rep. 466:

"That the doctrine of subrogation does go to the extent of giving to the surety, who has paid the debt of the principal, the benefit of the rights and

remedies of the creditor against all persons who were liable for the debt is both asserted by text-writers and sustained by the authority of many decided cases. * * * This is especially held to be true of the sureties of a fiduciary who are compelled to answer for his breach of trust, and they have repeatedly been subrogated to the rights and remedies of both the trustee and the cestui que trust against the fiduciary and those participating in the wrongful act."

It is held in an elaborate and well-considered opinion (*Railway Company v. Fire Association*, 55 Ark. 163, 175, 18 S. W. 43) that an insurance company, after paying the amount of a fire loss, may be subrogated to the assured's right of action against the person or corporation who caused the fire. The court said:

"Both were responsible to the assured. The loss for which they were responsible was one and the same, and the assured was entitled to but one satisfaction. It had a right to demand and receive payment of the loss from the insurer by virtue of its contract, as it did, without seeking to recover it of the wrongdoer. As it did so, and received payment of the insurer, the wrongdoer was not thereby discharged from liability; but the insurer succeeded to and became entitled to the assured's rights to relief against him to the extent of the amount paid as an indemnity, he being primarily liable, and the assured holds the claim against him in trust for the insurer."

The same conflagration which was the subject of the last-mentioned case was considered by the United States Supreme Court in *St. Louis, etc., Railway Co. v. Commercial Ins. Co.*, 139 U. S. 223, 11 Sup. Ct. 554, 35 L. Ed. 154, and Mr. Justice Gray, speaking for that court, said:

"In fire insurance, as in marine insurance, the insurer, upon paying to the assured the amount of a loss of the property insured, is doubtless subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss."

In *Boone Co. Bank v. Byrum*, 68 Ark. 71, 56 S. W. 532, the facts are that a collector of state taxes deposited money in a bank, which, with knowledge that the deposit consisted of taxes collected by him, appropriated a part of it to satisfy the collector's individual debt. The surety on his official bond, after paying to the state the amount of the misappropriation, was subrogated to the right of the state to the deposit against the bank.

Reason and authority, as disclosed by the foregoing citations, conduce to only one result; and that is that a surety, after paying the debt of his principal, is entitled to be subrogated to remedies which the principal had against third parties for the claim which the surety paid.

But it is argued, that, because the bank did not have actual knowledge and did not participate in the wrong perpetrated upon the county by Bourne, it is not brought within the principle of the foregoing cases, and should not be held liable to the surety. This view seems to have been adopted by the learned trial judge; but, after a full and patient consideration of the subject, we are unable to give it our sanction. The bank may not have been morally culpable; but its failure to discharge the duty of making inquiries suggested by the nonnegotiable character of the orders which it purchased, and by other circumstances attending the transaction, was an act of omission equally as effective to occasion injury to the county as many affirmative acts of commission could have been. Such inquiry at the audit-

or's or treasurer's office would have quickly disclosed that the payees were entitled to nothing, that they were myths, and that misrepresentation, fraud, and forgery were being practiced upon the county. Ignorance in fact occasioned by indulging indifference to almost obvious danger and negligence of the grossest sort is entitled to little consideration by a court of conscience. The bank's negligence operated as effectually to defraud the county as any willful or intentional participation in the fraudulent scheme could have done. If the bank did not have actual knowledge of the fraud, it did have, under well-recognized law, constructive knowledge of all the facts which reasonable inquiry would have disclosed, and therefore of the fraud itself. Such knowledge in ordinary civil actions subjects its possessor to all the consequences of knowledge in fact, and we see no reason why it should not do so in the present case. Notwithstanding the contrary contention, we think a brief reference to the authorities will support our conclusion.

In *Hall & Long v. Railroad Companies*, 13 Wall. 367, 370, 372, 20 L. Ed. 594, it is held that an insurer of goods destroyed by fire in course of transportation by a common carrier is entitled, after he has paid the loss, to recover what he has paid by suit against the carrier. In delivering the opinion of the court, Mr. Justice Strong makes use of the following language:

"Standing thus, as the insurer does, practically, in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner for the loss, he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar principles of equity. It is the doctrine of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner. * * * It has been argued, however, that these decisions rest upon the doctrine that a wrongdoer is to be punished; that the defendants against whom such actions have been maintained were wrongdoers; but that, in the present case, the fire by which the insured goods were destroyed was accidental, without fault of the defendants, and therefore that they stood, in relation to the owner, at most in the position of double insurers. The argument will not bear examination. * * * The law raises against him [the carrier] a conclusive presumption of misconduct, or breach of duty, in relation to every loss not caused by excepted perils."

In *The Potomac*, 105 U. S. 630, 634, 26 L. Ed. 1194, considering a similar subject, the Supreme Court makes the following observation:

"The mere payment of a loss by the insurer does not, indeed, afford any defense, in whole or in part, to a person whose fault has been the cause of the loss, in a suit brought against the latter by the assured. But upon familiar principles, often recognized by this court, the insurer acquires by such payment a corresponding right in any damages to be recovered by the assured against the wrongdoer, or other party responsible for the loss. * * *"

To the same effect are *Phoenix Ins. Co. v. Erie & Western Transportation Co.*, 117 U. S. 312, 320, 6 Sup. Ct. 750, 29 L. Ed. 873; *Wager v. Providence Ins. Co.*, 150 U. S. 99, 108, 14 Sup. Ct. 55, 37 L. Ed. 1013; *Norwich Union Fire Ins. Soc. v. Standard Oil Co.*, 8 C. C. A. 433, 59 Fed. 984; *Chicago, etc., Railroad Co. v. Pullman Car Co.*, 139 U. S. 79, 11 Sup. Ct. 490, 35 L. Ed. 97; *Atlantic Ins. Co. v.*

Storow. 5 Paige (N. Y.) 285. In the last-mentioned case it is held that where the master or shipowners are liable for a loss by theft for which underwriters are also liable, if the underwriters pay the loss to the assured, they are entitled in equity to be subrogated to his rights against the master or shipowners; and this, notwithstanding the fact that the thieves were in no way connected with the ship.

In *Browne v. Fidelity & Deposit Co. of Maryland*, 98 Tex. 55, 80 S. W. 593, the facts are that a guardian sold real estate belonging partly to himself and partly to his wards, and took notes payable to his own order for deferred payments, then sold and assigned the notes to a third party (Lee), and converted the proceeds to his own use. He was afterwards removed, and a new guardian appointed, who collected the amount of the defalcation from the Fidelity & Deposit Company, a surety on the defaulting guardian's bond. Thereupon the surety brought his action against Lee, the purchaser of the notes, claiming that the assignment of the notes to Lee were forbidden by statute, and therefore that he did not get good title by his purchase. The court held that, the assignment to Lee being unauthorized, the title to the notes did not pass, and he was liable to the new guardian for the value thereof, notwithstanding the fact he had paid the same to Lee. In that case there was no showing that Lee, the purchaser of the notes, was a party to the guardian's wrong, or that he had actual knowledge that the notes purchased were the property of the ward. He was affected with constructive knowledge only.

In *Skiff v. Cross*, 21 Iowa, 459, the facts are that the sheriff levied an execution in favor of Cross against John Mosier on a county warrant as the property of the defendant in execution and delivered the same, as permitted by Iowa statutes, to Cross, who received it in full satisfaction of the execution. Daniel Mosier claimed the warrant as his property, and sued the sheriff and sureties on his official bond for conversion of it, and recovered judgment, which the sureties paid. It was held that the sureties were entitled to be subrogated to the rights of Daniel Mosier against Cross, who got his property. Dillon, Judge, afterwards United States Circuit Judge for this circuit, delivered the opinion of the court. He said as follows:

"Now, if Cross would be liable in respect to the order if he had been proceeded against directly by Daniel Mosier, what good reason can be given why he should not be liable to the plaintiffs? We can discover none. Daniel had his election to go against Cross or against the sheriff and his sureties. He chose to proceed against the sheriff and his sureties, and the sureties were compelled to pay him. Is it any greater hardship on Cross to pay the amount of the order to the sureties than it would have been to have paid it directly to Daniel? Is it not equitable to treat the sureties who have paid to Daniel, as substituted by operation of law to Daniel's right as against Cross? The ground of Cross' liability is that he has received money to which he has no right or claim, and for which plaintiffs have been compelled to account."

The case does not disclose that defendant Cross had any actual knowledge of the ownership of the warrant in question when he took it in satisfaction of his execution. Whether he knew it or not seems from the opinion to have been quite immaterial, as the court appears to be totally indifferent to that fact.

In *Edmunds v. Venable*, 1 Patt. & H. (Va.) 121, a trustee or committee, holding two bonds showing on their face that they belonged to the estate of a lunatic, sold them to a third person, who thought he was engaged in an innocent and lawful transaction. The purchaser afterwards realized on them, and was held bound to account to the estate for what he received, notwithstanding the fact he had paid for them their full value; and it was further held that sureties of the trustee, who had been decreed to answer for his defaults, were entitled to be subrogated to the rights of the lunatic against the purchaser. The Court of Appeals held, in the language of one of the judges, that the right of subrogation existed, although the purchaser of the bonds—

“did not intend to commit a fraud, and did not suspect that he was engaged in a transaction not perfectly innocent, but unwarily had done that which may subject him to loss, but to no imputation upon his motives.”

It appears from the foregoing that what seems to us to be the natural equities between the parties is supported by abundant authority. The case was disposed of below on demurrer to the bill, which set out the facts as already discussed. The trial court sustained the demurrer, and entered a final decree dismissing the bill. This, from what has been said, was error.

The decree is reversed, and the cause remanded to the Circuit Court, with directions to permit an answer to be filed and otherwise proceed in harmony with this opinion.

HOOK, Circuit Judge (dissenting). The case in brief is this: A deputy county auditor of Ramsey county, Minn., for whose official conduct and integrity the surety company stood sponsor, fabricated some orders on the county treasurer payable to fictitious persons. He forged the names of the payees to indorsements of the orders and disposed of them to the bank for face value. In form the orders were nonnegotiable, but it is conceded that in fact the bank acted innocently in buying them. Afterwards the county treasurer, being in funds, paid to the bank the amount of the orders and accrued interest. When the criminal conduct of the deputy auditor was discovered, the county, acting through its board of county commissioners, cast about to recover its loss. It sued the auditor and the surety company, his official bondsman, and obtained judgment which met with the approval of the Supreme Court of Minnesota. *Board of Co. Com'rs v. Johnson*, 89 Minn. 68, 93 N. W. 1056. The surety company paid the judgment and now seeks reimbursement from the bank. It invokes the equitable doctrine of subrogation, and claims that the county could have maintained an action against the bank for the recovery of the money paid on the spurious orders, and therefore it should be put in the place of the county. It is admitted at the threshold of this proposition that if the bank had sustained the loss, instead of the county, and could in such case have recovered from the surety company, of course, the latter cannot now recover from the bank.

Could the bank have recovered from the surety company? I said at the beginning that the surety company stood sponsor for the of-

ficial conduct and integrity of the deputy. The Minnesota court so decided, and its decision to that effect lies at the root of the judgment which the county obtained and the surety company paid. A statute of Minnesota made the bond of the surety company available, not only to the county, but also to every person damaged by the official misconduct of the auditor; and in this connection we may substitute the deputy for the auditor, because the auditor and the surety company were responsible for whatever the deputy did by virtue of his office. The sole test of the liability of the surety company to the county was loss resulting from official misconduct of the deputy. Precisely the same test applies between the surety company and the bank and every other person seeking indemnity for loss caused by the deputy. Now the Supreme Court of Minnesota held in effect that the loss sustained by the county by the payment of the money to the bank in redemption of the orders was due to the official misconduct of the deputy. The recovery by the county upon the bond of the surety company could have proceeded upon no other theory. The swindling scheme of the deputy commenced with his forgery of the spurious orders, and it must be conceded that this was done under color of his office; in other words, that it was official misconduct. He was convicted and sent to prison for it. *State v. Bourne*, 86 Minn. 426, 90 N. W. 1105. The final act in the transaction was the payment by the county treasurer to the bank; and the Supreme Court of Minnesota in effect held in the action brought by the county that the loss of funds so caused was likewise due to the official misconduct of the deputy, and for that reason a recovery by the county upon the bond was sustained. The conclusion of my associates, therefore, exhibits this situation: The surety company, being answerable to every person injured by the official misconduct of the deputy auditor, is liable for loss caused by the forging of the orders, and also for loss caused by the payment of them by the county to the bank; but it is not liable for any intervening loss, because all intervening acts of the deputy were his personal acts, not done under color of his office. It seems to me that this is a short-circuiting that is not at all in harmony with the decision of the highest court of the state upon a matter peculiarly within its province to decide. If the county could recover from the surety company for the loss of the money it paid to the bank, and it was held that it could, I am unable to see why the bank, equally protected by the bond, would not, if the orders had remained on its hands, be entitled to recover the money it paid to the deputy auditor. That the bank might recover from the surety company seems clear, unless it is held that the decision of the Supreme Court of Minnesota is wrong, and that no recovery by the county from the surety company should have been allowed because, after the deputy, acting under color of his office, had forged the orders, he did some personal acts in furthering his scheme of obtaining moneys from the treasury, such as indorsing and selling them, which were not covered by the bond. That is what we are brought to. Can the conduct of the deputy properly be characterized as official delinquency towards the county, and at the same time be called mere personal, unofficial conduct as to third persons, who are equally protected by the

bond? What is there that makes the same conduct official in one view and personal in the other? Ordinarily the test is the scope of the officer's powers and duties and the nature of the transaction in question.

It is also said that loss by the bank could not have been caused by the official misconduct of the deputy, because such loss does not naturally follow the forgery of nonnegotiable orders. With the greatest respect for the views of my associates, I think this conclusion results from a misapplication of an admixture of rules of commercial paper with the doctrine of remote and proximate cause. They say in effect: If a county officer forges negotiable bonds and sells them the purchaser who sustains loss may recover from a surety which has contracted to protect everyone against official misconduct; but if he forges nonnegotiable county orders the purchaser who sustains loss may not recover. It cannot be denied that the officer is equally guilty of official misconduct in each case; but it is said that in the latter case the loss is too remote from the original cause, for the reason that it could not reasonably have been foreseen in the light of attending circumstances. This latter proposition is qualified by the observation that a purchase of nonnegotiable orders without inquiry as to their genuineness is out of the ordinary course of business, unnatural, improper, and incapable of anticipation. If this observation is vital to the position taken, it may be said that two answers suggest themselves: (a) The case before us is presented upon bill and demurrer. There is not the remotest suggestion in the bill that the bank purchased the orders without making inquiry as to their genuineness. (b) Nor is it averred that the purchase of such orders was not pursuant to a well-known business custom. I take it that every banker acquainted with the conduct of the fiscal affairs of counties knows that the purchase for investment of county orders which the county issuing them is not ready to pay is a common course of business. So in the last analysis the proposition is reduced to this: A loss sustained by the purchaser of forged nonnegotiable county orders is as a matter of law so remote from the act of forgery that the latter cannot be regarded as an efficient cause of the loss; that the mere fact that the orders were not payable to order or bearer breaks the otherwise obvious causal connection between the official misconduct and the loss. Even if the case before us can properly be reduced to this status, it seems to me to leap to the common understanding that the conclusion is unsound. It was just as likely that the orders would be dealt in by innocent parties as it was that the county treasurer would be finally so deceived as to pay them; and it is admitted that the payment by the treasurer was a proximate result of the forgery.

There is another view of the case: Even conceding that the surety company would not be liable to the bank, it does not necessarily follow that the former is entitled to the subrogation sought and to a recovery from the latter. There remain to be considered the equities of the parties as between themselves, in view of their relations to the entire transaction. The final question in a case of this character is: Who in good conscience ought to stand the loss? In answering it, I am unwilling to say that the surety for a forger should

be allowed to indemnify himself at the expense of an innocent victim. The surety company says to the bank:

"The indorsement and sale of the orders by the deputy were his personal acts. I am not responsible for them. Therefore, because you bought the orders, you should stand the loss."

But the bank may reply:

"You are responsible for his forgery, which was the first act and the dominant one in his scheme to defraud. Without it no one would have suffered loss. For a paid consideration you guaranteed the county and the public, including myself, against his official misconduct; and as between us you should not visit the loss upon one who acted innocently, and so wholly escape every consequence of a conceded breach of your bond."

The bank, which is a defendant here, is in possession of and holds the legal title to the money it got from the county. At law the surety company has no right against the bank, but must make a case that challenges the conscience of a court of equity—not one that merely follows the devious technicalities of the law. When equities are equally balanced, the position of the defendant or the possessor of the thing in controversy is the better. The legal title added to an equity prevails over an equal equity that is not so supported. In *Insurance Co. v. Clark*, 203 U. S. 64, 27 Sup. Ct. 19, 51 L. Ed. 91, a man and his sister conspired to defraud an insurance company. The former, having insured his life, disappeared. The latter, as beneficiary, sued and obtained judgment, which was paid. Interests in the policies had been assigned to attorneys under contingent fee contracts, and they got their portions of the judgment. It was afterwards discovered that the insured was living and that a gross fraud had been perpetrated. The company brought suit in equity against the beneficiary and the attorneys to recover the money paid. In fact, the attorneys acted innocently and had paid for their shares by their services. Recovery from the beneficiary was allowed, but denied as to the attorneys, who held under the assignments from the guilty beneficiary. The company sought to charge the attorneys with notice because of the non-negotiable character of the policies. The Supreme Court said:

"But notice cannot be established by the mere fact that, while the appellees (the attorneys) held an interest in the policies, they were assignees of choses in action, and took them subject to the equities. This is due to a chose in action not being negotiable. It does not stand on notice."

In a consideration of the equities of the parties, an important feature of the position of the bank is its innocence and good faith. Reference is made in the foregoing opinion to supposed negligence of the bank in buying the orders. The case comes here on bill and demurrer, and if the bank is to be charged with negligence the foundation for it must be found in the bill. I can find no averment in the bill directly or indirectly charging the bank with any negligent conduct whatever. It is not even said that in purchasing the orders it acted irregularly or out of the usual well-known course of business. On the contrary, there is an affirmative admission that it knew nothing of the fraudulent character of the orders. Moreover, the absence of any charge of negligence against the bank is given emphasis by the fact that there are affirmative charges of negligence against

the county treasurer, the chairman of the board of county commissioners, and the depository of the county funds. It is true that it appears from the bill that the bank purchased nonnegotiable orders and obtained payment of them by the county treasurer; but the status of the parties in such a case results from a fixed rule in the law of choses in action, and not from any supposed negligence of the purchaser in failing to make inquiries. *Insurance Co. v. Clark*, *supra*. As bearing upon the assumption of negligence, it is said that an inquiry at the auditor's or treasurer's office would have quickly disclosed the fraud; but the bill fails to charge either that such inquiry was not made or that, if it had been made, it would have resulted in the information. So how can we assume this fact prejudicial to the bank? On the contrary, we know from the averments of the bill and the statutes of Minnesota (Gen. St. Minn. 1878, c. 8, § 169) that about the time of the purchase of the orders they were taken to the treasurer, who indorsed on them a recital of lack of funds for their payment. We also know that about a year later these very orders were paid by the treasurer without question of their validity. The orders were fair on their face, every written evidence of their validity being genuine. When the bank secured them they bore the genuine signature of the deputy auditor, who had authority to execute valid orders; also an impression of the official seal of the auditor's office; also the genuine signature of the chairman of the board of county commissioners to a recital that they were issued by the authority of the board. Under these circumstances, would it not have been an unusual exhibition of diligence had the bank ignored these evidences of regularity and instituted an independent investigation of its own? Are we to say, in the absence of information from the pleader, that the bank omitted to do what ordinarily prudent men engaged in that business would have done under the same circumstances? It is a matter of common knowledge that such orders are widely dealt in by investors, much the same as special tax warrants are in the larger cities. If, when they are presented to the county treasurer, there is no money in the fund upon which they are drawn, the treasurer indorses that fact upon them, and thenceforth they draw interest until funds are available for their redemption. The interest is the inducement to the investors. *State v. Bourne*, 86 Minn. 432, 90 N. W. 1108.

It is suggested that, if the bank did not have actual knowledge of the fraud (and the bill admits it did not) it had constructive knowledge of all the facts which reasonable inquiry would have disclosed, and therefore of the fraud itself. As to this I need only refer to the rule applied by Mr. Justice Brewer in *United States v. Detroit Lumber Co.*, 200 U. S. 321, 333, 26 Sup. Ct. 282, 285, 50 L. Ed. 499, a case in which conflicting equities were weighed:

"When a person has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the court to say, not only that he might have acquired, but also that he ought to have acquired, it but for his gross negligence in the conduct of the business in question. The question, then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining and might by prudent

caution have obtained the knowledge in question, but whether not obtaining was an act of gross or culpable negligence."

So when it is said that the orders, being nonnegotiable, were taken subject to the defenses of the county, all is said that is relevant. Negligence, ordinary or gross, and notice, whether actual or constructive, have nothing to do with the case made by the bill in this cause. They are not for our consideration in weighing the equities of the bank, and were not considered by the trial court.

In my opinion the decree should be affirmed.

(156 Fed. 36.)

McELROY v. MASTERSON.

(Circuit Court of Appeals, Eighth Circuit. June 27, 1907.)

No. 2,532.

1. CANCELLATION OF INSTRUMENTS—GROUNDS—IMPROVIDENCE OR UNCONSCIONABLENESS.

An unmarried man 77 years old, and in feeble health, deeded his farm to his nephew on the expressed consideration of \$1 and other considerations, the deed reserving to the grantor a life estate. It was also orally agreed that the grantee should furnish support to the grantor at the grantee's own home, which he did so long as the grantor remained with him, and also paid the interest on a mortgage on the farm. Subsequently the grantor returned to the farm and commenced suit for cancellation of the deed. He was shown to have been mentally competent, and there was no evidence to establish coercion or undue influence. *Held*, that the fact that the deed did not impose a positive obligation on the grantee for the grantor's care and support did not authorize the court to set it aside as improvident and unconscionable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Cancellation of Instruments, § 3.]

2. EQUITY—POWERS OF CHANCELLOR—CONTRACT RIGHTS.

There is no comprehensive discretion reposed in the chancellor by modern equity jurisprudence to make and unmake contracts of parties sui juris subject to such limitations only as meet the approval of his conscience, but courts of equity are now required as much as courts of law to enforce contracts free from fraud, and to refrain from making contracts for the parties on which their minds never met.

3. SAME—MODERN JURISPRUDENCE.

In the process of development, equity jurisprudence has assumed the qualities of a composite system of settled rules and principles by which the property rights of parties are measured and limited, and are rendered more certain and stable.

Appeal from the Circuit Court of the United States for the District of Minnesota.

William D. Mitchell and Pierce Butler (Jared How, on the brief), for appellant.

A. A. Stone and Thomas Hessian, for appellee.

Before SANBORN and HOOK, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. This is a suit in equity to set aside and annul a deed executed by the appellee to the appellant February

3, 1903. The land conveyed consists of about 194 acres, valued at between \$9,000 and \$10,000. The grounds of attack on the deed are that it was given without consideration and obtained through undue influence and misrepresentation. At the time of the conveyance the appellee was about 77 years of age, and the appellant was about 58. The appellee is the uncle and godfather of the appellant. They were born in Ireland, immigrating to America in 1850. In the party was the sister of the appellee, and mother of appellant, and her husband and perhaps some children. The appellant's parents established a home in the city of New York, and the appellee was a guest in their home for about a year. After that he drifted for a number of years, working as a common laborer, attempting once to establish a homestead in Illinois, until finally, in 1865, he pre-empted the land involved in this suit, in Nicollet county, Minn. Neither he nor this nephew ever married. The latter continued to live in the city of New York, engaged in the trade of a hatter, and succeeded in earning an independent, respectable competence.

While there were other near relatives—a brother and some nieces—the appellee had no communication with them. The father and mother of the appellant died several years prior to 1903. While the said nieces lived in the city of New York, all the information the appellee seems to have had about them came from occasional correspondence with this nephew, the appellant. So much of the correspondence between them as was preserved, ranging from perhaps 1885 to January, 1903, shows that an unusual relation of affectionate attachment existed between this uncle and nephew. In his isolation, in the far away Northwest, the uncle's heart went out with an unceasing tenderness towards this nephew. He seemed to have regarded him as indeed his godchild. He was an illiterate man, and his letters bear evidence that to him writing was indeed a severe labor, and he seems to have assumed the burden of writing only when prompted thereto by the yearning desire to keep in touch with this nephew. Though expressed in crude form, his letters were invariably characterized by a sentimental feeling of unaffected regard for the appellant. He nearly always addressed him as "Dear Patrick," and closed his letters with the words "I remain your loving uncle to death." The solicitation for this correspondence, as a general rule, came from the uncle. He often chided the appellant when he neglected writing to him for a considerable length of time, and expressed himself as being delighted whenever he did receive a letter from him. This fact is of especial moment as indicating the entire absence of any selfish or sinister motive on the part of the appellant in maintaining a correspondence with his uncle. While his letters breathed the most kindly and considerate spirit and a tender solicitude for his uncle's welfare, there does not appear in one line of any of them a word or thought that should suggest to a reasonable, candid person a lurking purpose in the mind of the appellant to obtain aught from his uncle save a continuance of their affectionate relation. Any contrary suggestion is a perversion of the language of a simple-hearted, sincere man. Several years prior to 1903, the appellant visited his uncle, evidently on invitation, and certainly to the deep pleasure of the latter. In his

testimony the appellee himself does not attach to this visit any other motive than that of sincerity and kindness. There was not an incident connected with this visit to justify any imputation of an ulterior design to subserve any selfish purpose on the part of the appellant.

The evidence shows that the appellee was not a successful farmer. Early after the acquisition of this land he placed upon it a mortgage for \$1,400. This incumbrance accumulated until, at the time of the execution of the deed in question, the debt amounted to about \$2,900. The increase in the value of the farm was despite the appellee's improvidence, and his retention of it intact was attributable to the indulgence of the mortgagee, who was content to let the mortgage run so long as the interest was paid, as the increasing value of the security resulting from the development of the country was deemed ample protection. As appears from the correspondence between these parties, the maintenance of the farm was becoming somewhat of a burden to the appellee, and it is to be gathered from the correspondence that the appellant had suggested to him the advisability of selling it; but he seemed to be adverse to parting with it, and it is quite inferable from the evidence that the underlying purpose of the appellee all the while was to retain this land to the end, and that he designed after his death it should go to the appellant. In 1902, by reason of physical infirmity and business incapacity, the burden of this farm and the loneliness of his situation became such as to induce the appellee to remove from it to a nearby town, and board with some friends. He was sick, and evidently became apprehensive that he was approaching the end of life. Naturally enough in such situation his mind turned to the appellant; and on December 24, 1902, he wrote to him, saying:

"It is so long since I heard from you I thought I would try to write you a few lines to let you know how I feel. I am very feeble this winter. I have left my house. I was not able to care for myself. I have went to stay with a neighbor that has my place rented so there is no person in my house. Patrick I wish to hear from you if you are alive but I would like much better to see you. You told me when you were [here] if anything happened that you would come here to me and I think it very near the time. I think I will not be long here. I think you had better come on if you are alive so we can talk to each other. Do not delay as I cannot tell how I am going to last. I have no more to say as I do not feel able to write any more. I remain your loving uncle to Death."

It is inferable that the appellant answered this letter expressing the wish that his uncle should go to New York and live with him, as he could better take care of him. On the 9th of January, 1903, the appellee wrote the appellant as follows:

"I wish to inform you that I received your very kind and welcome letter. It gave me great comfort to hear that you are still living. I thought you were dead. It was so long since I heard from you. You said in your letter you wished me to go there. My business in such shape that it is pretty hard for me to go away and leave everything behind me and has no body to look after it. It is a very cold winter and I am not able to go out and see anyone about the matter. If I live to spring I hope to be able to find someone that will rent it for a number of years as I would wish to go there and be buried with my people. I am staying in Lesueur this winter. I locked the house. I did not want to be found dead there. If I find that I get any worse I will let you know so that you will look after my place so that there will be nobody to make any trouble. I had a letter from father Cauley. He said he lived with Roberts."

daughter Bridget and that she was married to a relation of his he said she would meet me with open arms if I would go there I did not answer his letter as I did not feel good I wish you would let me know if my brothers and sisters are living or dead if I find I cannot stand it this winter I will write to you or have somebody else write to you for me so that you can come on me fix matters I do not intend to give what little there will be to anyone else I think I have no more to say at present I remain your loving uncle to Death."

On receipt of this letter it is but just to say that, prompted by a humane and commendable spirit, the appellant left his business, and on or about the 19th day of January, 1903, arrived at his uncle's boarding house to look after him and take him home with him. Their meeting was mutually most cordial. While somewhat feeble, the appellee was sitting up and was able to move about. It was concluded that he should return to New York City with the appellant and make his home with him. Assisted by the appellant he busied himself in closing up his business affairs, disposing of a little grain and some personal property on the farm, and settling up some debts owing by him.

The only witnesses to what led up to the incident of the execution of the deed are the parties to this suit. There is no essential conflict between them as to the fact that it was the long entertained purpose of the appellee that on his death the land should go to this nephew. He had every reason to so remember and reward him. The appellant had remembered and administered to him in the past when he hungered for sympathy and needed care. He had sent him raiment that protected him in winter. He had sent him clothing that made him presentable in public; and he had come to him in the hour of his extremity to render him needful assistance and cheer. The subject of who should be the beneficiary of the landed estate after the old man's death was broached by him. The only material matter about which they differ in the testimony as to what occurred between them just prior to the execution of the deed is the contention, now advanced on behalf of the appellee, that his plan was to give the land by will to the appellant, that the appellant objected to this as it might be attacked by dissatisfied relatives, and that it was better at once to convey by deed. The testimony of the appellee in chief was that he consented to the substitution of the plan of making the deed on the assurance of the appellant that whenever requested thereto he would reassign the property to the grantor. This is denied by the appellant. On cross-examination the appellee twice stated and admitted that the matter of the reassignment of the land on his request was not broached until some time after they were in the city of New York. He also testified that he made the same statement to Mr. Smullen, who drew the deed in question, that he had made to the appellant. Smullen's testimony was that he drew the deed precisely as directed by the appellee, reserving to him therein a life estate in the land, and that after it was written he read it over to him, that he fully understood it, and he thereupon signed and acknowledged it as his final act and deed. Everything was harmonious when the appellee accompanied the appellant to the city of New York. The former admits in his testimony that in respect of his treatment and comfort the appellant fulfilled his expectations. He was given a comfortable room, wholesome food, \$2 per week for spending money, all the whisky he wanted, and was kindly treated. He was left free in the

use and perception of whatever rents accrued from the land. The accrued interest on the mortgage the appellant cared for.

Two causes supervened, in our opinion, to create discontent and this lawsuit: (1) The nieces met the uncle and displayed an inquisitive interest in his landed estate. He had to tell them of the conveyance to this favored nephew. (2) He began to tire of city life and to long for the purer air of Minnesota and the associations of the old home. The appellant thought this was not the best course for the old man, then 78 years of age. But he (the latter) demanded a reconveyance, or reassignment of the land, as he termed it. A wordy altercation ensued. The appellee asked for money to return to Minnesota, and the appellant, who had furnished the money to take him to New York, refused to send him back. Thereat one of said nieces, who had never hitherto given him water or bread, provided him money with which he returned, in August, 1903, to the town from whence he came to New York. He could not have felt seriously angered at anything his nephew said to him in New York, for soon after his return he wrote him a kindly letter, a part of it relative to the condition of the land. He found the income from the land wholly inadequate to his support, and he became almost an object of charity. Some of his neighbors, more lavish with advice than with any serviceable bestowments, made suggestions to him. As soon as he collected the little money arising from the year's rental of the land he invested it in legal advice, the result of which was this lawsuit, the success of which would doubtless further result, after paying the lawyers, in bestowing the remaining interest in the land upon other relatives, leaving the appellant, the hitherto cherished and deserving relative, entirely out of consideration.

There was no tangible evidence of the want of sufficient mental capacity to enable the appellee to fully comprehend and understand the force and legal effect of the deed he was executing. His testimony quite demonstrates that in mentality and quickness of perception, even at the time of the hearing, he was rather the superior of the appellant. He exhibited instances of marked aptitude in the fence and foil of the alert witness on cross-examination. It is the settled law, as expressed in *Russell's Appeal*, 75 Pa. 269, that a man is permitted "to dispose of all his property by way of bounty to others, and his gifts when made with full intention and knowledge of the act are irrevocable." And time and again the Supreme Court of the United States has declared that:

"The undue influence for which a will or deed will be annulled must be such as that the party making it has no free will, but stand in vinculis. It must amount to force or coercion, destroying free agency." *Conley v. Nailor*, 118 U. S. 134, 6 Sup. Ct. 1001, 30 L. Ed. 112; *Ralston v. Turpin*, 129 U. S. 663, 9 Sup. Ct. 420, 32 L. Ed. 747; *Mackall v. Mackall*, 135 U. S. 167, 10 Sup. Ct. 705, 34 L. Ed. 84; *Towson v. Moore*, 173 U. S. 17, 19 Sup. Ct. 332, 43 L. Ed. 597; *Kennedy v. Bates*, 142 Fed. 52, 56, 57, 73 C. C. A. 237.

The law sets its face sternly against that insidious insistence of disappointed relatives that a preferential donation or bequest of property should be regarded with suspicion when induced by considerate attentions and tender manifestations of the beneficiary toward the benefactor. Any other spirit of the law would transform exhibitions of

affection into sinister hypocrisy, and needful attentions and helpfulness by a near relative to the aged into a badge of fraud. Mr. Justice Brewer, in *Mackall v. Mackall*, *supra*, said:

"It would be a great reproach to the law if, in its jealous watchfulness over the freedom of testamentary disposition, it should deprive age and infirmity of the kindly ministrations of affection, or of the power of rewarding those who bestow them. * * * It would have been strange if such a result had not followed; but such partiality towards the one, and influence resulting therefrom, are not only natural, but just and reasonable, and come far short of presenting the undue influence which the law denounces. Right or wrong, it is to be expected that a parent will favor the child who stands by him, and give to him, rather than the others, his property. To defeat a conveyance under those circumstances, something more than the natural influence springing from such relationship must be shown. Imposition, fraud, importunity, duress, or something of that nature, must appear; otherwise that disposition of property which accords with the natural inclinations of the human heart must be sustained."

The learned trial judge in his opinion found that there was no undue influence exerted or fraudulent representations made, within the recognized rules of law, by the grantee to persuade the grantor to the execution of this deed. But he placed his action in decreeing the annulment of the deed principally upon the ground that the making of the deed, although the grantor reserved to himself a life estate in the property, was improvident, because it failed to incorporate into it a positive obligation on the part of the grantee to care and provide for the grantor during his life; and for that reason he concluded that the transaction was unconscionable and ought not to be sustained.

The consideration expressed in the deed is as follows:

"For and in consideration of the sum of other considerations and one dollar."

Without deciding whether or not the express understanding between the parties that in consideration of the making of the deed the grantee was to share his home with the grantor and take care of him during his life was enforceable, as the proof of such consideration would in no wise contradict or be inconsistent with the written instrument, the evidence shows that in every particular the grantee kept his promise, and there is every reason to believe that he would have done so to the end had the uncle been content to remain at his home. The obligation rested upon the owner of the estate in remainder to take care of the mortgage on the land and the taxes thereon, to prevent the destruction of his estate. The interest thereon was being paid by the appellant. So that as the matter stood the appellee had the use and profits of the land during his life, and a home provided for him without charge. And to meet the criticism of the absence in the deed of an express obligation to so care for him, at the hearing before the circuit court, the appellant offered to enter into obligation, to be expressed in the decree of the court, to pay to the appellee in money \$300 per annum, or \$25 per month, during his natural life. This the trial judge thought ought to be satisfactory to the appellee, and suggested to his counsel its acceptance. This provision could have been made effective by a consent decree of the parties. But it was declined by the appellee's counsel, and the judge felt that he could not so decree against the assent of the complainant.

The bill of complaint should be dismissed, unless it can be maintained that there is a comprehensive discretion reposed by modern equity jurisprudence in the chancellor to make and unmake contracts of parties sui juris, constrained only by no other limitations than those which meet the approval of his conscience. Courts of equity are now as much required as courts of law to enforce contracts free from vitiating elements of fraud, and to refrain from making contracts for the parties on which their minds never met.

In the formative period of equity jurisprudence the English Chancellors, in the absence of established principles and recognized sensible precedents, were much given to the pursuit of their own sense of absolute right and the dictates of their own individual conscience. But in the process of development equity jurisprudence has assumed more the qualities of a composite system of settled rules and principles, by which the property rights of parties are measured and limited, and are rendered more certain and stable. Pomeroy's Eq. Jur. § 48, etc.; *Roberson v. Rochester Folding Box Company*, 171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 478, 89 Am. St. Rep. 828.

The decree of the Circuit Court must be reversed, and the cause remanded, with directions to dismiss the bill of complaint.

(156 Fed. 42.)

In re EPPSTEIN.

(Circuit Court of Appeals, Eighth Circuit. September 2, 1907.)

No. 62.

1. BANKRUPTCY—JURISDICTION—SUMMARY PROCEEDING.

A court of bankruptcy may by summary process require those who assert title to, or an interest in, property which has rightfully come into its possession and control as part of the bankrupt's estate, to present their claims to that court, and, the notice being reasonable, may proceed to adjudicate the merits of such claims.

2. SAME—PROPERTY IN CUSTODIA LEGIS—INTERFERENCE WITH MUST BE WITH COURT'S SANCTION.

While property in the course of administration under the bankruptcy act is not exempted from taxation, or freed from tax liens or claims therefore fastened upon it, it is nevertheless in custodia legis, and a pre-existing tax lien or claim cannot be converted into a full title by the procurement of a tax deed without the court's sanction.

(Syllabus by the Court.)

Petition for Revision of Order of the District Court of the United States for the District of Colorado, in Bankruptcy.

Ernest Morris, Alfred Muller, and M. Summerfield, for petitioner.
E. W. Hurlbut, for respondent.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

VAN DEVANTER, Circuit Judge. The Colorado Carlsbad Water Company, a corporation existing under the laws of Colorado, was adjudged a bankrupt upon the petition of creditors. Before the petition

was filed certain real property of the bankrupt had been sold for taxes, but the title, the right of possession, and the actual possession remained with the bankrupt, and these passed to the trustee upon his qualification. After the lapse of the three years designated in the redemption statute, and while the property was yet in the custody and control of the court of bankruptcy as part of the bankrupt's estate, the holder of the tax sale certificate, without the leave of that court, applied to the county treasurer and obtained a tax deed purporting to invest him with all the right, title, and interest of the bankrupt as the former owner. Thereafter the trustee, learning of the sale and deed, tendered to the claimant thereunder the amount for which the property had been sold, with statutory interest, penalties, and costs, and demanded a surrender of the tax title. The tender and request were refused, and, upon the trustee's petition, the claimant was ordered to show cause why the deed should not be set aside. He appeared and objected that his right could not be adjudicated in a summary proceeding, whereupon the objection was sustained and the petition dismissed. A petition for revision brings the matter here.

The question of jurisdiction is not free from doubt, but we are of opinion that the result of the cases is that a court of bankruptcy may by summary process require those who assert title to, or an interest in, property which has rightfully come into its possession and control as part of the bankrupt's estate, to present their claims to that court, and, the notice being reasonable, may proceed to adjudicate the merits of such claims. *In re Kellogg*, 121 Fed. 333, 57 C. C. A. 547; *In re Rochford*, 124 Fed. 182, 59 C. C. A. 388.

The question of the merits must also, upon authority, be ruled in favor of the trustee. *Wiswall v. Sampson*, 14 How. 52, 14 L. Ed. 322; *Taylor v. Carryl*, 20 How. 583, 15 L. Ed. 1028; *Barton v. Barbour*, 104 U. S. 126, 26 L. Ed. 672; *In re Tyler*, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689; *Ledoux v. La Bee* (C. C.) 83 Fed. 761; *Clark v. McGhee*, 87 Fed. 789, 31 C. C. A. 321; *Virginia, etc., Co. v. Bristol Land Co.* (C. C.) 88 Fed. 134; *Johnson v. Southern, etc., Ass'n* (C. C.) 132 Fed. 540. We do not mean that property in the course of administration under the bankruptcy act is exempt from taxation, or freed from tax liens or claims theretofore fastened upon it (*Swarts v. Hammer*, 194 U. S. 441, 24 Sup. Ct. 695, 48 L. Ed. 1060, and cases *supra*), but that it is in custodia legis, and that any act interfering with the court's possession, or with its power of control and disposal, and done without its sanction, is void. The general rule is practically conceded, but it is said that the procurement of the tax deed was not such an interference, because it merely perfected an incipient title, and did not disturb the possession. The distinction does not impress us. The issuance of the deed was the principal act connected with the sale. If effective, it extinguished the right of redemption, which was still alive, transferred to the vendee the title and right of possession, became prima facie evidence of the validity of the sale and the proceedings anterior to it, and started the statute of limitations to running against any claim to the contrary. The attempt to thus strip the court of all but the naked possession was plainly an interference with its power of control and disposal, and consequently was of no effect with-

out its sanction, although the possession was not then disturbed. Such is the effect of the ruling in *Wiswall v. Sampson*, and *Barton v. Barbour*, *supra*. The cases of *Rice v. Jerome*, 97 Fed. 719, 38 C. C. A. 388, and *Whitehead v. Farmers' Loan & Trust Co.*, 98 Fed. 10, 39 C. C. A. 34, relied upon as expressing a contrary conclusion, do not, as we think, go further than to hold that when the question is presented to the court before the tax deed is issued, and it appears that there is no lawful objection to the recognition of the tax claim and that there has been no offer to redeem, the fact that the property is in custodia legis is not of itself enough to warrant the court in withholding its sanction to, or in enjoining, the issuance of the deed.

We are accordingly of opinion that the dismissal of the trustee's petition was error, and the case is remanded to the District Court with directions to vacate the order of dismissal, to grant the claimant reasonable time within which to meet the petition upon the merits, and to take such other proceedings as may be proper in the premises.

(156 Fed. 44.)

MUNSON v. STANDARD MARINE INS. CO., Limited.

(Circuit Court of Appeals, First Circuit. August 2, 1907.)

No. 679.

1. INSURANCE—MARINE POLICY INSURING TUG AGAINST LIABILITY FOR LOSS OF TOWS—EXPENSE OF SUCCESSFUL DEFENSE.

A marine policy insuring a tug merely against legal liability for loss or damage caused to its tows by collision or stranding creates no liability on the part of the insurer for the expense of successfully defending the tug against a suit to recover for the stranding of tows.

2. SAME—SUE AND LABOR CLAUSE.

In a marine policy insuring a tug against legal liability for loss or damage caused to its tows or other vessels through collision or stranding, the usual "sue and labor" clause has reference only to the subject-matter of the insurance, and has no application to expenses incurred in defending the tug itself against an unsuccessful suit to establish its liability.

In Error to the Circuit Court of the United States for the District of Massachusetts.

For opinion below, see 145 Fed. 957.

G. Philip Wardner (Edward E. Blodgett, on the brief), for plaintiff in error.

James E. Carpenter (Samuel Park, on the brief), for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This is a suit at common law on a marine insurance policy attaching on the steamtug *Carbonero*, indemnifying against liability to her tows. One or more barges in her tow were lost. The tug was libeled. The ultimate decision was in favor of the tug, and this suit was brought to make good the expenses of the litiga-

tion. The Circuit Court decided in favor of the underwriters, whereupon this writ of error was sued out. The only question we need consider is whether, inasmuch as the result showed that the tug was not at fault, any claim can arise on the policy for reimbursement of the expenses of the litigation or any part thereof. As the plaintiff in the Circuit Court is the plaintiff in error, and the defendant in that court is the defendant in error, we will refer to them as plaintiff and defendant respectively.

We desire to remove at the outset from our consideration claims made by the plaintiff to the following effect: He says that, when the tug was libeled, it would have been sold unless stipulated for, and he was obliged to secure a surety on the stipulation at considerable expense. Also, the libel was originally brought in the District Court for the District of Massachusetts, and then appealed to the Circuit Court of Appeals, both courts deciding in favor of the tug; but the Circuit Court of Appeals found that the tug was not free from negligence, though it also found that it was not proven that the loss of the tows was in consequence of that negligence. Under those circumstances, the Circuit Court of Appeals refused costs to the tug. Therefore the plaintiff says that the defense was unsuccessful to some extent. All these propositions are easily disposed of, because whatever may have occurred with reference to these details were but the incidents of litigation, and go the same way as the major elements thereof.

Of course, this policy, like all marine policies, was built up historically on the ancient forms; and so, instead of being drawn strictly as a policy of indemnity, it was undoubtedly adapted from the well-known policies on hull, cargo, or freight. Under such circumstances, some expressions will be found to be inconsistent with the main purpose of the policy, and not easily reconciled with other strong and clear language which it contains which must guide us. These facts are so far from embarrassing the court in its decision that they are easily disposed of by being referred to the historical nature of the policy sued on, by virtue of which old material always remains into which the new is inserted, although the new ordinarily controls the old. There are some expressions which raise a suggestion that it was intended that always, whenever a claim of liability was made, the suit was to be defended at the cost of the underwriters. Many policies of indemnity expressly provide to that effect, especially the usual policies which insure casualties in manufacturing establishments, and other casualties appertaining to various buildings, and liabilities from employers to the employed. What there is in this policy, however, is carefully so expressed as to leave it entirely to the option of the underwriters whether or not they would elect to assume the defense of any litigation which might arise. With these explanations, practically all we need say is that, on their face, the terms of the policy are clear that there is no liability on the part of the underwriters when there is no liability on the part of the tug or its owner. The various portions thereof expressing what we refer to were carefully pointed out in the opinion of the learned judge of the Circuit Court, and need not be rehearsed by us.

Neither does the plaintiff show us any marine insurance usages, or any decisions of the courts, which justify us in relieving him from the express terms of the policy. On the other hand, the only decisions of the court in point are in favor of the defendant. The last case of authority cited by either party is a decision of the Court of Appeal. *Cunard Steamship Company v. Marten* (1903) 2 K. B. 511. The late leading case may be said to be *Xenos v. Fox* (1868) L. R. 3 C. P. 630, 4 C. P. 665, also finally decided by the Court of Appeal. We will refer to these again, merely adding here that their true relation to the law of marine insurance can be best understood, as cases can ordinarily be best understood, by examining them as they appear in their proper setting in *Arnold on Marine Insurance* (7th Eng. Ed., 1901), beginning with section 862 and ending with section 876.

The question we have before us relates to marine insurance, which, although it requires in many respects a broad and liberal treatment, is also in some respects technical, so that attempted analogies to other departments of the law may aid but little, and even not at all, in solving the issue which presents itself. As illustrating this proposition, we refer especially to what is said in *Arnold on Insurance* in the sections we have cited, and we might, if necessary, take time in referring to other writers on that subject with the same result. The marine insurance doctrine of contributions to "particular averages" and "particular charges," with which averages or charges the claim now presented must classify itself, if it can be recognized at all, might well have been laid upon a broad foundation, so as to be governed by the same rules which apply to contributions to general averages, or to the adjustment of marine salvages; but they never have been. One has always been distinguished from the other in usages of marine insurance by a broad line. "Particular averages" and "particular charges" must sometimes be contributed to by the underwriters, although bringing their liability in excess of the face of the policy, while not necessarily so with reference in general averages and salvages. Therefore even the rules applicable to general averages and salvages cannot be availed of, and so much less can the cases and principles brought to our attention by the plaintiff, but drawn from other departments of the law. For example, he relies on 1 *Brandt's Suretyship and Guaranty* (3d Ed., 1905) § 238, as establishing a proposition that where a surety is sued on account of an alleged liability for his principal, and defeats the action, he may recover from the principal the expenses involved in defending the suit. Unfortunately the citation he makes does not sustain him, although probably his proposition is sound to a very considerable extent. This arises because, within certain lines, the surety is regarded as the agent of the principal, and entitled to such protection as an ordinary agent is entitled to; and also because equity, which for the most part is looked to to protect the surety, has liberal rules and effective remedies with regard to the entire topic of suretyship. On the other hand, the question before us being peculiar to marine insurance, it happens, as was said by Lord Justice Lindley, in *Johnston v. Salvage Association*, 19 Q. B. D. 458, 460

(1887), that contracts like that before us are not contracts of indemnity in any proper sense of the term. What the learned lord justice was considering particularly was the sue and labor clause, which we will presently take up; but his observation applied to this class of policies at large. He said:

"Such a contract is not a contract of indemnity in any proper sense. It is a contract to pay the assured expenses which he might incur, but not to indemnify him against any claims made by other people against him."

He then distinguished the broader rules of the equity courts to which we have already referred. All that he said is in line with the observations we have made, that analogies governing this case cannot safely be found in other departments of the law.

The plaintiff, however, relies more especially on the sue and labor clause contained in this policy. That clause is quoted by him as follows:

"It shall be lawful and necessary for the insured, his, her or their agents, factors, servants and assigns, to sue, labor, travel for and make all reasonable efforts in and about the defense, safeguard and recovery of such vessels, crafts and cargoes, or any part thereof, without prejudice to this insurance, and the acts of the insured or this company or their agents, in recovering, saving and preserving the property in case of disaster shall not be a waiver or an acceptance of an abandonment, or as affirming or denying any liability under this policy, but such acts shall be considered as done for the benefit of all concerned, and without prejudice to the rights of either party."

It is first of all to be noticed that this is not the true ancient sue and labor clause. It omits that portion by which the underwriters agree to contribute. It retains only that which the rigid ancient law thought necessary in order to preserve to the insured his right to abandon. Mr. Phillips seemed to think that possibly the underwriters might be held to contribute under the fundamental rules governing marine insurance, or as an implication from the license to sue and labor. Phillips on Insurance (5th Ed., 1867) par. 1742. We do not find that his suggestion is sustained. In fact, the sue and labor clause is so ancient that it is impossible to go back of it. Owen's Marine Insurance Notes and Clauses (3d Ed., 1890) speaks of it as of great antiquity, and always embodied in the policy. Gow's Insurance (1895) 120, places it as far back as the London policy of 1613, and merely adds that it seems to be indigenous to England. It certainly is so ancient that no trace of the English law of contribution goes back of it, so that it is not possible to sustain Mr. Phillips' suggestion. However, this is not important, because the fact that the present policy made a departure from the ordinary policy in this respect indicates a purpose that the underwriters should not contribute. In this particular the case is less favorable to the insured than *Cunard Steamship Company v. Marten* (1903) 2 K. B. 511, 512, already referred to, where the sue and labor clause contained the usual agreement to contribute. Moreover, a very common running-down clause contained a stipulation for the payment of costs, meaning the expenses of litigation, in resisting claims of the vessel collided with, whether successful or unsuccessful. Owen, *ubi supra*, 96. The omission of any such provision in the policy before us is a warning that it ought not to be lightly inserted. Therefore,

on these grounds alone, we might properly reject the plaintiff's proposition in reference to this clause.

However, the authorities are all against him. We will not rely on *Cunard Steamship Company v. Marten*, just referred to, because that decision was put on narrow grounds. Lord Justice Roemer, at page 515, does, indeed, restate what we have already said with reference to the historical construction to be given insurance policies, with regard to the fact that language intended to accomplish a peculiar purpose is inserted in the printed parts of the customary form notwithstanding the printed parts may have little or no application to the precise risk insured. But he let the case turn on the fact that the sue and labor clause ordinarily does, and then did, refer to "the said goods and merchandise and ship," and indicated that it could have no relation, and is inapplicable, to an indemnifying policy. In the present case, *Cunard Steamship Company v. Marten*, if literally accepted, might compel us to hold that, if the tug had been liable for stranding the tows in question, the tug could not recover from the underwriters any expenditure made in relieving the tows from their stranded position. This we would be reluctant to do. It is sufficient for us that we determine that the sue and labor clause has relation only to the subject-matter of insurance, which in the present case was the liability of the tug to the stranded tows, and nothing else. The cause of the legal expenses involved here arose, not out of the fact that the policy attached, but out of the fact that somebody claimed that it attached when in fact it did not.

Not only does the positive language of the policy lead to the conclusion we have stated, as explained by the learned judge of the Circuit Court, but we repeat that the authorities are decisive, and this even when the complete sue and labor clause is present. They are well summed up in the sections of *Arnold on Insurance* to which we have referred, and are very crisply stated in *Tyser's Marine Insurance Losses* (1894) p. 51, as follows:

"The underwriter is not liable under this clause [meaning the sue and labor clause], unless he would be liable for the loss to avert which the labor or expense is incurred."

The earliest case to which we may refer is *Biays v. Chesapeake Insurance Company*, 7 Cranch, 415, 419, 3 L. Ed. 389 (1813). That was a suit on a memorandum policy limiting liability to a total loss. The court held that the sue and labor clause did not apply, unless, perhaps, in case where the services might have prevented an actual total loss. The principle involved was announced as follows:

"If this clause [meaning the sue and labor clause] be construed with reference to what is most evidently its subject-matter—that is, a loss within the policy—and in connection with other parts of the instrument, it seems impossible to misunderstand it, or that it should receive so extensive an application as the plaintiff is desirous of giving to it. The parties certainly meant to apply it only to the case of those losses or injuries for which the assurers, if they had happened, would have been responsible."

These observations were recognized as representing the law by Mr. Phillips in his work to which we have referred at section 1777.

We can pass over more than half a century to *Xenos v. Fox*, L. R. 4 C. P. 665, 667 (1869), already referred to. Here the sue and labor clause was in a policy which had a running-down clause. *Xenos v. Fox* has been many times relied on, both by the courts and the text-writers. Chief Justice Cockburn there said that the sue and labor clause applied to a loss or misfortune happening to the thing insured; and it was held that the underwriters were not liable for the expenses of a suit brought against the owners of the vessel in whose behalf the policy issued, which suit was unsuccessful. We might well have disposed of this case on the authority of the decisions last cited, namely, *Biays v. Chesapeake Insurance Company* and *Xenos v. Fox*, which have stood unquestioned; but the propositions submitted to us were of sufficient interest and importance to justify the consideration which we have given them.

The judgment of the Circuit Court is affirmed, and the defendant in error recovers its costs of appeal.

(155 Fed. 52.)

HALL v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 27, 1907.)

No. 1,405.

DISORDERLY HOUSE—PROSECUTION FOR KEEPING—PROOF OF CHARACTER OF HOUSE.

Although Alaska Pen. Code, § 128, expressly makes common fame competent evidence in support of an indictment for keeping a bawdyhouse for purposes of prostitution, such evidence alone is not sufficient proof to warrant a conviction, but there must be some evidence that the house was in fact kept and used for such purposes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Disorderly House, §§ 26-29.]

In Error to the District Court of the United States for the Second Division of the District of Alaska.

Plaintiff in error, defendant below, was tried and convicted under an indictment charging him with keeping and setting up a bawdyhouse for purposes of prostitution within the limits of the town of Nome, Alaska, the indictment being framed under section 127, tit. 1, of the Act of Congress, approved March 3, 1899, 30 Stat. 1272, which provides that if any person shall keep or set up a house of ill fame, brothel, or bawdyhouse for the purpose of prostitution, fornication, or lewdness, such person upon conviction thereof shall be punished by imprisonment in the county jail not less than three months nor more than one year, or by fine not less than \$100 nor more than \$500. Defendant sued out a writ of error, and has assigned errors based upon rulings of the lower court and the instructions given to the jury.

Jas. W. Bell, C. D. Morane, Hobbes & Bell, A. H. Elliot, W. H. Bard, and James E. Fenton, for plaintiff in error.

Henry M. Hoyt, U. S. Atty.

Before GILBERT and ROSS, Circuit Judges, and HUNT, District Judge.

HUNT, District Judge, after making the foregoing statement of the case, delivered the opinion of the court.

Plaintiff in error first presents the same question of jurisdiction that we have considered and decided in the case of *Rosencranz v. United States*, 155 Fed. 38; *Hornstein v. United States*, 155 Fed. 48, and *Botts v. United States*, 155 Fed. 50. Upon the authority of those decisions we hold that the District Court for the District of Alaska had jurisdiction of the case, and that it properly overruled the plea and demurrer.

In this case, as in that of *Botts and Haughey v. United States* (just decided by this court) 155 Fed. 50,¹ error is assigned upon the charge of the court that, "in all prosecutions for the offense of keeping a bawdyhouse, common fame or reputation is competent evidence in support of the indictment as to the character of the house. Therefore, if the house has the reputation of being a bawdyhouse or house of ill fame beyond a reasonable doubt, that is sufficient to support a finding that it was such, and if there is no evidence offered to the contrary. * * *" This was an erroneous statement of the law, as we have shown in the case of *United States v. Botts and Haughey*, supra, in that it authorized a conclusion upon one of the essential elements of the charge against the defendant upon a quantum of proof less than the law demands. It is not possible to regard the error as cured or without prejudice. The jury were not only directed that they could predicate a finding upon the measure of proof prescribed by the instruction, but the evidence in the record shows that proof of the reputation alone of the house alleged to have been kept by defendant was relied upon as sufficient, and that no evidence of use or purpose other than reputation was considered necessary.

Moreover, the plaintiff in error requested a charge that reputation or fame, while competent, was by itself "not sufficient evidence to warrant a conviction for keeping a bawdyhouse; there must be some other evidence showing that the house is actually used as a bawdyhouse"; but the court, consistent with its rulings throughout the trial, refused so to charge. Inasmuch as our opinion in *United States v. Botts and Haughey*, supra, covers the point under consideration, we do not deem it necessary to repeat the views we there laid down. We advise that upon a new trial the court reform its definition of a reasonable doubt so as to avoid the double definition which was given substantially in language which was criticised by this court in *Owen v. United States*, 130 Fed. 279, 64 C. C. A. 525.

The judgment is reversed, and the cause remanded for a new trial.

¹ 83 C. C. A. 646.

(156 Fed. 321.)

NEW ENGLAND TELEPHONE & TELEGRAPH CO. v. BUTLER.

(Circuit Court of Appeals, First Circuit. October 18, 1907.)

No. 685.

1. WITNESSES—COMPETENCY—KNOWLEDGE OR MEANS OF KNOWLEDGE OF FACTS.

A clerk in the office of a district foreman of a telephone company is not, from the fact of his position alone, qualified to testify as to the duties of subforemen, who are under the orders of his chief, on an issue as to whether the chief duty of such subforemen was superintendence, so as to render the company liable to other employes for their negligence under the Massachusetts employers' liability act (Rev. Laws, c. 106, §§ 71-79).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 80-87.]

2. MASTER AND SERVANT—LIABILITY FOR NEGLIGENCE OF SUPERINTENDENT—MASSACHUSETTS STATUTE.

The fact that a foreman having charge of a gang of men works with his hands, the same as the rest of the men, for the greater part of the time, or even all of the time, does not necessarily exclude him from being one "whose * * * principal duty is that of superintendence," within the meaning of the Massachusetts employers' liability act (Rev. Laws, c. 106, §§ 71-79), for whose negligence, causing an injury to another employe, the master is liable.

3. SAME—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.

Plaintiff was a telephone lineman engaged, with others, under a subforeman, in stringing new wires. He was upon the cross-arm of one pole holding back two wires, while they were being run over the cross-arm of the next pole. To the end of the wires was tied a rope, and beyond that a piece of insulated wire. The foreman and others were beyond the next pole pulling the wires over the cross-arm, when he called to plaintiff to "let them come." Plaintiff did so, and the wires sagged and came in contact with highly charged electric light wires, which ran transversely across the line at a lower level, and he received a shock which caused his injury. There was evidence that the method pursued was not usual nor proper under the circumstances, the plaintiff did not know the position of the light wires, and, because of intervening trees, could not see it distinctly, nor tell whether the insulated wire, the rope, or the bare wires were over the light wires when he was ordered to slack. *Held*, that whether he had such knowledge of the situation that he assumed the risk, or was justified in relying on the care of the foreman and obeying the order, or was negligent in doing so, were questions for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1068-1132.

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 48 C. C. A. 314.]

In Error to the Circuit Court of the United States for the District of Massachusetts.

Henry W. Dunn (Pitt F. Drew and Powers & Hall, on the brief), for plaintiff in error.

William A. Pew, Jr., for defendant in error.

Before PUTNAM, Circuit Judge, and ALDRICH and DODGE, District Judges.

DODGE, District Judge. The three counts of the declaration upon which the case went to the jury were all based on the Massachusetts employers' liability act (Rev. Laws, c. 106, §§ 71-79). A fourth count

charging liability at common law was stricken out by amendment. Each of the counts under the statute alleged injuries to the defendant in error (hereinafter called the plaintiff) by reason of the negligence of a superintendent in the employ of the plaintiff in error (hereinafter called the defendant). The first count did not specify wherein the alleged negligence of the superintendent consisted, the second count alleged negligence in failing to adopt proper, suitable, and safe methods for doing the work on which the plaintiff was employed, and the third alleged negligence in giving an order to the plaintiff to pay out a certain wire under circumstances rendering it dangerous to him so to do. The answer denied each and every allegation in these counts.

The plaintiff was one of a gang of men, all employés of the defendant, who were engaged in stringing new telephone wires upon certain poles belonging to the defendant, on Rantoul street, in Beverly. Five men in all composed the gang, including McKenzie, a subforeman, and in charge. McKenzie was the alleged superintendent whose negligence was claimed to have caused the plaintiff's injury.

The jury found for the plaintiff, and the case is here on exceptions to rulings made and instructions refused or given by the court at the trial.

The first assignment of error is that a question put on behalf of the defendant to one of its witnesses was excluded.

The witness was one Gwinn, employed by the defendant as clerk in the office of one of its district foremen. The excluded question was: "What are the duties of the subforemen, one of whom, I understand, McKenzie was?" There was no dispute that McKenzie was a subforeman. It appeared that he was one of four subforemen, all under the authority of the district foreman in whose office the witness was employed. The question at issue as to his duties being whether or not his principal duty was superintendence, if all the subforemen performed, or were expected to perform, or had assigned to them, the same duties, evidence tending to show what those duties were might have been admissible. But it did not appear that Gwinn knew what those duties included, and what they did not include. It was not to be presumed, *prima facie*, that as a clerk in the district foreman's office he had such knowledge. It appeared that he assumed the district foreman's duties when the latter was absent, as often happened, and in that way came in contact with the four subforemen; that among the duties so assumed was the giving of directions to the subforemen when sent to do work of various kinds on the lines within the district—where to go, what pieces of work to do, and what men to take with them. It appeared that he kept the district foreman's books, made a record of the work done, and paid the men. But in all this there was nothing which would naturally require or enable him to know what the duties were which the defendant had assigned to or expected from its subforemen. As to the duties in fact performed by them when at work, it is not contended that he knew, or had any opportunity to know, from actual observation, what these were. He testified that he was present very little when work was being done. The extent to which he claimed to have knowledge regarding the subforemen's duties was stated by him as follows:

"Q. And did you know the course of the business? A. In what way?"

"Q. In reference to what they did and what their duties were. A. What kind of work they would be doing?"

"Q. Yes. A. Yes.

Even if the question were otherwise admissible, we do not think the court was required, in view of what appeared, to treat this statement as qualifying the witness to testify upon the point inquired about and allow the question excluded to be answered.

The next assignment of error is that the court ought to have directed a verdict for the defendant on all the evidence.

We consider first the claim that there was no evidence sufficient to warrant a finding that McKenzie's principal duty was that of superintendence. That superintendence was his sole duty was not contended.

There was no dispute that McKenzie was in charge, as subforeman, of the gang in which the plaintiff was working when injured, and was thus intrusted with and exercising superintendence. McKenzie was himself a witness for the defendant, and testified that during the entire period of his employment as subforeman he worked himself nearly all his time, that he was doing actual manual labor part of his time; how much of the time during the day he could not state. On cross-examination he said that when in charge of a gang engaged on a particular job he had full charge, the choice of methods rested with him, he gave orders to carry out his own ideas, watched the men to see that his ideas were carried out, told them what material to use, and saw that they used it, kept a supervision over them, whatever else he was doing, had in mind, whatever else he was doing, to see that they were obeying his orders, and was supervising all the time. Before he so testified the plaintiff had introduced evidence which, as the defendant concedes, tended to prove that McKenzie "usually spent the greater part of his time directing the men and only a small part of his time in working with his hands." The defendant contends that the different jobs done manifestly varied so much in character that while McKenzie or any other subforeman might be superintending only on one job, on another he might be doing little or nothing but manual labor; and therefore that evidence as to what he usually did does not necessarily show in what kind of work he was spending most of his time, or what his principal duty was on the day of the accident. It contends further that the only evidence relating to this particular day or job was that McKenzie was working with his hands most of the time. That McKenzie did in fact work with his hands on this job is unquestioned. He was pulling on a wire when the plaintiff was hurt. Two of the men in the gang, witnesses for the plaintiff, said, on cross-examination, one that McKenzie worked pulling ropes and doing such things and helping out most of the time that day; the other that McKenzie might on that day have worked with his hands the same as the rest of the men the greater part of the time, and he thought he did so. No other witness was questioned upon this particular point. But if McKenzie, as might well have been found from the evidence, had been given authority of superintendence, and was not a mere laborer in charge of a gang, the fact alone that he did manual work also, even for the greater part of his time, would not necessarily require the con-

clusion that his principal business was not that of superintendence. Working at all times with his hands would not necessarily prevent the exercise of superintendence in such manner that superintendence would be his principal duty. *Canney v. Walkeine*, 113 Fed. 66, 51 C. C. A. 53, 58 L. R. A. 33. The jury had before them the nature of the work in hand, as well as the evidence above summarized, and were entitled to judge of the extent to which such work involved or required superintendence. We think that the learned judge who presided at the trial was right in declining to hold that there was no sufficient evidence upon which the jury could find McKenzie's principal duty to have been superintendence.

We next consider the claim that the evidence did not warrant a finding that the plaintiff was injured by reason of McKenzie's negligence.

The manner in which the injury was received was not much in dispute. The evidence regarding it may be stated as follows:

Between the two poles belonging to the defendant, from one to the other of which the new telephone wires were being strung (referred to in the evidence as pole No. 3 and pole No. 4), six electric light wires, not belonging to the defendant and carried on a different set of poles, ran transversely to the direction in which, and somewhat below the level at which, the new wires were to be strung. These wires, or some of them, were charged with a dangerous current. They were coated with a weatherproof compound, but were not true insulated wires. The coating would not, in the majority of cases, prevent a current flowing from them to a bare telephone wire in contact with them, if the telephone wire were grounded somewhere. When injured, the plaintiff was up on pole 3, at the lower cross-arm, holding back the new telephone wires, two in number, which were being strung together. One end of them had been passed over the cross-arm where he was toward pole 4. Both were uninsulated or "bare" wires. To that end of them which had been passed over the cross-arm there had just been attached one end of a piece of rope, and to the other end of the rope insulated wire, which had been passed over the electric wires and over the cross-arm on pole 4. McKenzie, beyond pole 4, was pulling on this insulated wire, thereby drawing it, the rope attached to it, and thereby the new "bare" wires fastened to the rope, in a direction from pole 3 across and above the electric light wires, toward pole 4. At some distance from pole 3, in the opposite direction from it, were two other men belonging to the gang, standing on the sidewalk and paying out the new wires; each holding a coil from which one wire ran. Between them and pole 3 was still another telephone pole, referred to as No. 2, about as far from pole 3 as pole 4, but in the opposite direction. The new wires ran from the coils held by the two men along the ground for some distance, then over a cross-arm on pole 2; thence to pole 3 on which the plaintiff was holding them back; thence, as above described, toward pole 4. The electric light wires were nearer to pole 4 than to pole 3. There was evidence that the poles were 130 feet apart, and the electric light wires 28 feet from pole 4 at their nearest point. As to the exact distance of the electric light wires below the level of the cross-arm on pole 4, to which the new wires were being strung, there was some conflict. The plaintiff's evidence made the distance less

than the defendant's evidence. But, whatever it was, danger to the plaintiff was involved, under the circumstances, in contact between the new "bare" wires and the electric light wires below them. If, when the ends of the new wires had been pulled far enough toward pole 4 to be over the electric light wires, they and the rope or insulated wire whereby they were being drawn across should be permitted to sag between poles 3 and 4 enough to lower them to the level of the electric light wires, such contact would occur. There was evidence that this was what happened, that such contact did occur, and that the plaintiff was injured because of it. McKenzie, according to the evidence, while pulling, as above described, upon the insulated wire, called out from beyond pole 4, where he was: "Let them come." The plaintiff eased up on the wires he was holding, still retaining his hold, one or both the new wires touched the electric light wires, fire was seen at the point of contact, the new wires became charged with electricity, which also manifested itself in the coils held by the two men on the sidewalk, one coil becoming red hot, and the plaintiff fell from his position against other telephone wires already fixed to pole 3. According to his testimony, he remembered nothing after he eased up on the wires in obedience to McKenzie's order, until he was being taken down from the pole in his injured condition.

There was evidence from an expert called by the plaintiff that the above method of stringing the wires was not usual and not proper in view of the circumstances. To use covered or insulated wire, instead of bare wire, would have been wisest in his opinion. This would have prevented danger, and it would be proper to run one wire at a time; the foreman standing in the middle of the street and instructing the men on the poles so that they could pull the wire along, keeping it taut all the time. This witness, it is true, said on cross-examination that, with the method used, if the man holding the wires back did the work as he would expect the ordinary intelligent lineman to do it, he thought the probabilities were that he would get the new wire across; but this, it is obvious, was not necessarily an admission that the method adopted was usual, safe, or proper. Covered wire was at hand at the time, and it appeared, without objection, that the wire finally strung between poles 3 and 4 over the electric light wires—the work being completed by McKenzie and the remaining men after the plaintiff's injury—was covered and not bare wire, though McKenzie's evidence tended to ascribe this use of covered wire to purposes other than that of securing the safety of the men engaged.

There was also evidence that McKenzie himself ordered the plaintiff up pole 3 with the new wires and the rope tied to them, himself tied the other end of the rope, after the plaintiff had passed the wires over the cross-arm on pole 3, to the insulated wire, and himself took part in passing the insulated wire over the electric light wires and the cross-arm on pole 4, before he went beyond pole 4, and pulled upon the insulated wire, as above stated.

It appeared, further, that there were, besides the electric light wires, two trolley wires, which also crossed the line of the telephone wires between poles 3 and 4. These ran at a level considerably below that of the electric light wires. They were bare wires and known to be

dangerous. McKenzie told the plaintiff when he sent him up pole 3 to hold the telephone wires back off the trolley wires; but, according to the plaintiff, no warning as to the electric light wires was ever given him, he did not know they were there, and he was never told, and did not know, that the new wires were to be carried over electric light wires at all. The defendant's evidence was, on the contrary, that McKenzie told the plaintiff, when he ordered him up pole 3, with the new wires, to hold them off the electric light wires.

There was evidence that, after the plaintiff reached the position on pole 3 in which he was when injured, the branches of a tree so obstructed his view as to prevent his seeing the electric light wires from there clearly enough to tell on which side of pole 4 they went, or whether the new wires were going above or below them; and that the building against which they had to be seen from where he was had also the effect of preventing him from seeing them with sufficient distinctness for that purpose. Upon this point there was contradictory evidence from the defendant. The trolley wires he could see, and he was looking out for them.

Whether McKenzie was negligent or not as regarded the plaintiff was clearly a question for the jury on the evidence, unless it be true, as the defendant contends, that:

"Whatever conclusion is reached as to the propriety of the method employed, and on whatever grounds the allegations of negligence in the declaration are rested, the risk was obvious to the plaintiff, was one incidental to the business in which he was engaged, and was therefore one which he assumed."

The defendant further relied in support of this contention upon evidence in substance as below.

The plaintiff had had previous experience in working on wires. This had been gained during the 14 months prior to his injury, the time during which he had worked for the defendant. There was some question as to the nature and extent of his experience in such work within that time. He admitted that he knew, generally speaking, the danger involved in letting bare telephone wires touch uninsulated electric light wires; knew also that without going up and examining them he could not tell whether electric light wires were insulated or not; knew that electric light wires were common in city streets; and knew that there were such wires not only in Beverly, but on some part at least of Elliot street, the street in which the wires ran which caused his injury. He was injured soon after dinner on September 30, 1905. In broad daylight he had, of course, the same opportunity of seeing the electric light wires in question, before he went up pole 3, which was open to any one else in the vicinity. Printed "Instructions for the Avoidance of Accidents," warning its employes to inspect for themselves at all times, directing them not to place reliance upon inspections by foremen or fellow workmen, and cautioning them against the danger from all high-tension wires, were displayed, according to the defendant's evidence, in its stock room at Salem. These the plaintiff denied having seen, but he admitted having visited the room referred to "quite a few times." During his experience with such work he had once been warned by another subforeman regarding danger from an electric light wire, and he had once heard the same subforeman give

a similar caution to another man. With these two exceptions he had never heard the subforeman give such warnings. There was no other evidence that such warnings were usual or customary.

The general risk of injury from electric light wires was doubtless a risk incidental to the plaintiff's employment, and a risk which he had assumed. We do not think, however, that the risk to the plaintiff from these wires was, under the particular circumstances shown, a risk which must necessarily have been obvious to him at the time of his injury.

If it could be said that he must necessarily have known that it would depend on him alone whether the bare wires he held should touch electric light wires or not, the risk involved in letting them do so would have been obvious, and he would have taken the chance at his peril of finding the electric light wires dangerously charged. But that he must have had such knowledge at the time he was ordered to let the new wires come was not the only reasonable conclusion which might have been drawn from the evidence, notwithstanding what appeared as to his experience, or as to his opportunities to know that there were electric light wires somewhere between him and pole 4. It might still have been found not obvious to him, from his position on the pole, that the new wires were to go over the electric light wires, or were to go so near them, if over them, as to involve danger of contact with them. He was not being permitted to do the work in his own way, and had nothing to do with the determination of these questions. They were being settled by McKenzie alone. Still less was it necessarily obvious to the plaintiff how far toward the dangerous wires the new wires had been drawn at the moment of McKenzie's order. So long as slackening them would result only in touching the dangerous wires with the insulated wire on which McKenzie was pulling, or with the rope which came next, letting them come involved no danger. It was not necessarily obvious to the plaintiff that the time had come when, if he slackened them, the bare wires would or might touch the electric light wires. Nor was the court bound to rule that the probability of danger was obviously such as to make it the plaintiff's duty to investigate, at his peril, before obeying McKenzie's order to let the wires come. If the danger was not obvious to him, he was entitled to rely on McKenzie's personal supervision as an assurance that the way in which the work was being done was reasonably safe, and could not be said to have assumed any risk which due care in superintendence might have avoided. *Rockport Granite Co. v. Bjornholm*, 115 Fed. 947, 53 C. C. A. 429; *Mahoney v. Bay State Pink Granite Co.*, 184 Mass. 287, 68 N. E. 202; *Meagher v. Crawford Laundry Machinery Co.*, 187 Mass. 586, 73 N. E. 853.

The jury might have found that the plaintiff while on pole 3 did not have a fair opportunity to discover for himself what the consequences of compliance with McKenzie's order might be, or to what extent it could be safely complied with. They might have found that McKenzie, in charge of the whole operation and on the ground below, was or could have been in a position to know and judge accurately regarding these matters. If the danger might have been fully obvious to McKenzie, but not obvious to the plaintiff, we think it was rightly

left to the jury, under the circumstances shown, in view of the available means of avoiding danger which McKenzie might have used and the opinion of the plaintiff's expert, to say whether a reasonably prudent superintendent would have followed the method adopted by McKenzie, instead of a method safer in some or all the respects suggested. Or, if the method adopted was found to be in other respects proper, it was still for the jury to say whether reasonable prudence in superintendence did not require a caution to the plaintiff at the critical time not to let the wires come too far, instead of ordering him to "let them come," without any caution whatever. Due care in superintendence might have required such a caution, under the particular circumstances, even if it was not the practice, generally speaking, to warn men at work in running wires regarding the presence of other wires which might be dangerous.

It is also evident from what has been stated that contributory negligence on the plaintiff's part in permitting the new wires to touch the electric light wires did not necessarily appear.

The only remaining error assigned is the refusal of an instruction requested on the question of the plaintiff's due care in another respect. The instruction asked was that he was not exercising due care if, at the time of the accident, any part of his person was in contact with any telephone wires other than the new wires which were being strung. We think it would have been obviously improper to bind the jury thus rigidly to a conclusion from one fact which might have been found, without regard to any other circumstances developed in the case and involving questions for the jury.

Whether or not the plaintiff had proved that he was in the exercise of due care was rightly left to the jury on all the evidence under proper instructions.

The judgment of the Circuit Court is affirmed, with interest, and the defendant in error recovers his costs of appeal.

(156 Fed. 328.)

HAIGHT & FREESE CO. v. WEISS et al.

(Circuit Court of Appeals, First Circuit. October 1, 1907.)

No. 695.

1. COURTS—JURISDICTION OF FEDERAL COURTS—CORPORATIONS.

It is settled law that for purposes of the jurisdiction of a federal court a corporation is a citizen only of the state in which it is incorporated; and, where it is doing business and has an established office in another state, such fact does not affect its citizenship, but it may be there sued in such court by a citizen of the state residing in the district.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 860.

Jurisdiction over corporations, see note to *St. Louis, I. M. & S. Ry. Co. v. Newcom*, 6 C. C. A. 174.]

2. EQUITY—JURISDICTION—REMEDY AT LAW.

A bill against a corporation, which asks for the cancellation of releases alleged to have been fraudulently obtained by defendant, and further asks that defendant be wound up on the ground of insolvency, and also on the ground that its business is illegal, states a case cognizable in equity, so that the bill cannot be dismissed on the ground that complainant has an adequate remedy at law, because, when a bill states one cause

of action cognizable in equity, it is not subject to a motion to dismiss, even though it states other grounds of suit not so cognizable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 759.]

3. APPEAL—REVIEW—FINDINGS OF MASTER.

Where an order referring the whole cause to a master would have been irregular when made, under the equity rules, unless by consent of the parties, such consent must be presumed by the appellate court, in the absence of anything on the subject in the record.

4. SAME—WAIVER OF RIGHT OF APPEAL—ACQUIESCENCE IN ORDER.

Where, after the entry of an *ex parte* order appointing a temporary receiver, the defendant by agreement made by counsel consented to the retention of the receivership, he cannot review such order on an appeal taken from a subsequent decree in the cause.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3611.]

Appeal from the Circuit Court of the United States for the District of Massachusetts.

See 152 Fed. 479.

Gilbert F. Ordway (Franklin Bien, on the brief), for appellant.

William P. Maloney, for appellee Weiss.

William D. Turner (George Hoague, on the brief), for appellees Colt and Campbell and others.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This is a bill in equity, brought on May 8, 1905, by Anna L. H. Weiss, administratrix, against the Haight & Freese Company, a corporation, in behalf of herself and other creditors who might intervene; but neither the complainant nor any one else who did intervene had recovered judgment. The complainant describes herself as a citizen of Massachusetts, and the respondent as a corporation created by the laws of New York, with a usual place of business in Massachusetts, and as having appointed the commissioner of corporations of Massachusetts its attorney for receiving service of process. Of course, the allegation that it has a usual place of business in Massachusetts, coupled with the allegation that it had appointed the commissioner its agent for receiving service of process, must be accepted as equivalent to a statement that the corporation was transacting business in Massachusetts at the time the bill was brought.

A number of the errors assigned insist merely that the Circuit Court had no jurisdiction because the allegations of the bill make the corporation a citizen of Massachusetts, so that consequently, on its face, both complainant and respondent are citizens of that state. After the Supreme Court has rendered decision on decision that a corporation cannot migrate, and that the fact that it is doing business in a state other than that of its organization does not create it a citizen thereof, it seems quite inconceivable that a proposition of this character should be urged on us. The respondent cites a decision of the Circuit Court for this circuit (*Consolidated Store Service Co. v. Lamson Co.*, 41 Fed. 833); but that decision was entirely in harmony with the law as we have stated it. It is true that in that suit, which was between two corporations, neither corporation was organized in the state constituting

the district where the suit was brought; but that was not the point which was pressed on the court. The court, at page 834, referred distinctly to the rule we have stated, that a corporation cannot migrate, and expressed the fact that this was even then well settled. The opinion continued as follows:

"I think, however, the true ground upon which the court should take jurisdiction is this: That the corporation consents to be sued as a condition for doing business within such state, and that it should be held to its agreement."

At that time this proposition was somewhat doubtful, but it has since been thoroughly established by the Supreme Court to be the law; and it is on that ground, in connection with the fact that complainant is a citizen of Massachusetts, that the corporation was lawfully served in the district of Massachusetts, and the Circuit Court for that district could take jurisdiction.

The complainant declares that she is the administratrix of the estate of one Charles Weiss; that the respondent is a corporation doing what is known as a "bucket-shop" business at Boston, New York, and elsewhere; that her intestate gave the respondent orders for the purchase and sale of stocks, paying in various sums of money amounting in all to \$5,380; that he supposed the respondent was actually buying and selling stocks on his account; that, instead of buying and selling, the respondent was simply making book entries, without any actual transactions, thus doing the "bucket-shop" business; that, after the decease of Weiss, the complainant, as administratrix, had a settlement with the respondent in which it made due her only \$160; that both the complainant and her intestate were ignorant of the fact that the respondent's transactions with the intestate involved in the account were fictitious, in that no actual purchases and sales were made; that the account was wholly fictitious, unknown both to Weiss and the complainant, as his administratrix; that, in consequence thereof, the respondent really owed the complainant, as such administratrix, at the time of the settlement, \$5,380, less \$160 paid her by it; that full releases had been given both by Weiss and by the complainant, as his administratrix, in ignorance of the facts; and that the releases were therefore invalid. The bill contained prayers that an account might be taken of the amounts due complainant, and for such other relief as the case might require, which, of course, involved the canceling of the releases.

The bill also complained that the respondent was engaged in an illegal enterprise, meaning what it described as a "bucket-shop" business, and that therefore the corporation should be restrained, and be wound up, and its assets distributed. It further alleged that the corporation had a large number of creditors and not sufficient assets to pay their claims, and that it was carrying on its operations from day to day by means of the money received from its customers, dealing with them in the illegal and fraudulent manner which we have described, and it was so framed as to make the alleged insolvency another ground for the distribution of its assets. The allegations of the bill, and the portions thereof asking relief, were not exactly in the order or the phraseology which we have stated, but the substance was in accordance therewith.

Sundry creditors were permitted to intervene; but we do not per-

ceive, so far as that is concerned, that we will have any occasion to do more than to state the fact.

On the filing of the bill, and without notice to the respondent, but on a motion therefor which was supported by a bond given by the complainant with a surety in the penal sum of \$10,000, conditioned to respond to damages as usual, a receiver was appointed, the order for which, of course, was merely interlocutory, so that the receiver as thus appointed should probably be described as an interlocutory receiver. On June 5, 1905, the respondent filed an answer, the substance of which is sufficiently stated by it as follows:

"The answer of the defendant alleged that Charles Weiss, the complainant's intestate, fully understood the nature of his transactions with the defendant, and that the defendant transacted business with said Weiss according to his instructions; that the complainant, as administratrix, was paid the sum due the said Charles Weiss according to his account with the defendant, and thereupon, after a full opportunity to examine the same, freely and voluntarily executed and delivered to the defendant a release under seal, wherein she released and discharged the defendant from all right of action, claim, or demand for any payment at any time heretofore made or value of anything at any time heretofore delivered on any contract or transaction whatever, and covenanted never to sue therefor. The answer further alleged that the business of the defendant was legitimate and proper, and that it kept proper books of account, and was able to meet all its just claims in the ordinary course of business."

It filed no plea nor demurrer. Subsequently it amended its answer; but we need not refer to the details of this. On January 17, 1906, the complainant filed a general replication, and thus the case was put fairly and formally at issue on serious and important questions of fact and law. No proceedings, however, were taken in accordance with the rules in equity 67 et seq., which direct how proofs shall be made up after formal issues in the manner we have described; but the case was referred to a master, who passed on all the substantial issues, and made a report to which the respondent excepted at great length. The exceptions were overruled, and, on June 10, 1906, a decree was entered sustaining the claims of the original complainant and of some of the creditors who intervened, and settling the amount of each. We do not find the decree specifically adjudged that the releases in question were invalid and ordered them annulled. It, however, adjudged that the allegations of the bill of complaint had been fully sustained by the proofs, and, as we have said, it established the claims of the complainant and of the intervening creditors. This necessarily includes an adjudication setting aside the releases, notwithstanding the lack of specific phraseology to that effect. The decree also contained the following:

"Ordered, adjudged, and decreed as follows:

"That the receiver heretofore appointed in said cause, James D. Colt, be, and he hereby is, made permanent receiver, with full power to receive, sue for, and recover all moneys, debts, or property to which said company may be entitled, and to enforce, by suit or otherwise, or to compromise, in his discretion, any and all liabilities of any person or corporation to said company; to sell and dispose of, either at public auction or at private sale, at such prices and upon such terms as he may deem expedient, all property, choses in action, rights of action, and assets belonging to said company; and with all such other powers as are incidental to a full and complete administration of his duties as such permanent receiver, to the end that all the property and effects of said

corporation may be collected and converted into cash, in order to be distributed as hereinafter provided."

This, in accordance with the settled practice of the Supreme Court, was an appealable decree; and thereupon the complainant seasonably appealed to us, and assigned formally 17 alleged errors. The seventeenth referred to the exceptions to the master's report of which we have already spoken, as to which the respondent's brief relies on 31, making in fact 48 distinct alleged errors on which we have been asked to pass.

In the progress of the proceedings, the receiver settled an account, to which some objections were taken by the respondent. The respondent did not, however, take out any citation to the receiver, brought to our attention or which we have discovered, so that the account is not before us. Notwithstanding the receiver was not made a party to the appeal, he has filed a brief, which we have no occasion to consider, not only because no issue involving him is before us, inasmuch as he is not named in the citation, but also because it is the receiver's duty to hold the scales evenly, and not to intermeddle beyond the orders of the court appointing him in questions between the original parties to the litigation which do not personally affect him. As, however, the allowance of the receiver's accounts and certain special allowances to the receiver were assigned by the respondent as errors, and as both parties have submitted certain views in reference thereto, we may as well observe that the record is in no form to enable us to pass on the questions involved with regard to either branch of this topic. The account covers nearly 10 printed pages, and is made up of numerous details, the most of them of petty amounts. The order of the Circuit Court allowing it was general and in lump. The accounts were never sent to a master so far as the record shows; and, even if there were any proofs or suggestions which would enable us in any particular to fathom any of the questions involved, we should decline to do it. As explained by the Supreme Court in *Chicago, etc., Railway v. Tompkins*, 176 U. S. 167, 179, 20 Sup. Ct. 336, 44 L. Ed. 417, we should not undertake the work which should be done by a master. Therefore in no event is there sufficient in the record to enable us to take up this topic.

A proposition made by the respondent that the court was without authority to allow the receiver's accounts until the final determination of the cause was, of course, without support, either in law or practical sense, with reference to one like that in question here, which related mainly, if not entirely, to minor necessary expenses pendente lite.

Several errors assigned relate to the refusal to grant a motion to dismiss the bill. We are told that some time during the progress of the litigation the respondent moved to dismiss the bill on the ground, as stated by it in its assignment of errors, that the complainant had an adequate remedy at law. The briefs of both parties have paid scant regard to our rules, and, as to this motion, neither has referred us to the page where it can be found, so we take the facts from the parties. It is said that this motion was not made until after replication, the reference to the master, and the filing of his report, and it is claimed by the complainant that this delay operated as a waiver. The bill contains several alleged grounds of proceeding, all of which are equitable in

their nature, and for none of which can a remedy be given at law. The first is for relief by canceling of releases under seal said to have been fraudulently obtained, which is peculiarly a topic for equity. The next is the claim that the corporation was insolvent, and asking for the winding up of its affairs on that ground. Passing by the question whether a bill for that purpose should, if objected to, be allowed to be maintained outside of the district of the domicile of the corporation, and also the question arising from the fact that the Supreme Court has steadily maintained that a debtor has a right to an issue to a jury on a claim which has not gone to judgment, and that therefore, in the federal courts, an ordinary creditors' bill cannot be maintained until there has been a judgment, such relief is clearly equitable in its nature, unless there is some statute especially providing for the winding up of corporations.

The third topic of which the bill treats is a claim that the corporation be wound up because its main business was that of conducting "bucket shops," which it is said is of a fraudulent character. Passing by the question whether a corporation can be wound up for any reason of that nature unless a statute of the state of its creation especially provides therefor, this topic is also one purely for equitable consideration. Therefore, aside from the fact that, even where there is an adequate remedy at law, the right to exclude the complainant from the chancery may be waived when the topic is of an equitable character, as complainant says was done here, it is clear that the whole subject-matter of this bill was purely equitable, and, therefore, in no event could a motion be sustained of the character we have described. Indeed, we may go further and remark that, inasmuch as the claim for the canceling of the releases in question was properly suable in equity, a motion to dismiss would not lie, even if the entire burden of the bill aside from that was not anywhere cognizable, because even in that event the respondent's remedy would not be by a motion to dismiss, or by a general demurrer, but by a demurrer to the parts of the bill which were demurrable and an answer or plea to the rest.

The remaining errors assigned, except the seventeenth, and except the objection based on the fact that a receiver was appointed without notice, are either clearly frivolous or relate to rulings as to which the record is not sufficient to show that they could be prejudicial, even if they were erroneous. The seventeenth assignment concerns exceptions to the rulings of the master. The master's report was summarily filed without any submission to the parties of a draft as required in equity, so that there was no opportunity to file exceptions before him, and, consequently, no explanations by him which would enable this court to understand the relations of the exceptions to the facts of the case. Neither were the proofs brought in by the master. The parties have not referred us to the order appointing the master, and we have not found it. It was said in the opinion of the learned judge of the Circuit Court, and also by counsel for the complainant, that this order did not require him to return the proofs into court. We are unable, therefore, to discover enough in the record to assist us in determining whether his rulings objected to were material or prejudicial, even if erroneous.

In fact, inasmuch as the reference to the master of the issues raised by the bill and answer, at the stage of the case when it was made, was irregular under equity rules 67 et seq., to which we have referred, and under the decisions in *Kimberly v. Arms*, 129 U. S. 512, 524, 9 Sup. Ct. 355, 32 L. Ed. 764, and *Davis v. Schwartz*, 155 U. S. 631, 636, 637, 15 Sup. Ct. 237, 39 L. Ed. 289, unless made by the consent of the parties, we are unable with this defective record to divest his report in any particular of the peculiar force which, according to the decisions we have cited, must be given it. While we are not able to ascertain from the record that the reference was by the express consent of the parties, yet, as otherwise it would have been irregular, and was not objected to so far as the record shows, we must conclude that it had their implied consent if not an express one. In any view, however, there is not enough before us to enable us to review any of the findings excepted to. The decree appealed from conformed strictly to the findings, so that it follows that we cannot review it adversely in any particular.

We have been asked to pass on 48 distinct propositions. We think we have explained fully our views on all the topics to which our attention has been at all carefully called; and, there are so many objections, the court cannot be expected to run out for itself any questions with regard to which it has been addressed only in a general manner.

One topic of an interlocutory character remains to be considered. As we have said, a receiver of the assets of the respondent corporation was appointed immediately on the filing of the bill, without notice to it, on the giving of a bond, with a surety, in the penalty of \$10,000. The fact that a receiver was so appointed makes the burden of a very considerable number of the errors assigned. Appointing a general receiver of the assets of a corporation, or a copartnership, or an individual, carrying on an active business, in which the maintenance of the credit of the respondent is a necessary element, is quite equivalent to the issue of an execution before judgment, and means, ordinarily, financial ruin. Therefore, in *Joseph Dry Goods Co. v. Hecht*, 120 Fed. 760, 764, 57 C. C. A. 64, the opinion rendered in behalf of the Circuit Court of Appeals for the Fifth Circuit well said:

"Notice should be given and the defendant furnished an opportunity to be heard, except in cases of imperious necessity, requiring immediate action by the court, and where protection can be afforded the plaintiff in no other way."

Consequently, in that case the decree of the Circuit Court appointing a receiver was reversed on an appeal taken within the period of statutory limitation. The receiver here was appointed on May 8, 1905. The act now in force is that of April 14, 1906 (34 Stat. 116, c. 1627), which has not changed the law so far as any question before us is concerned. The law in force on May 8, 1905, was that of June 6, 1900 (31 Stat. 660, c. 803 [U. S. Comp. St. 1901, p. 551]). Under the last-named statute the respondent might immediately have appealed from the decree appointing the receiver; and it was settled, in accordance with plain rules of interpretation, in *Joseph Dry Goods Co. v. Hecht*, just cited, that an appeal would lie notwithstanding the order appointing the receiver was *ex parte*.

The time limit for an appeal under the statute of 1900 was, as is well known, 30 days. It has never been decided by the Supreme Court whether that statute, or other statutes of that class, still permit appeals from the interlocutory orders to which they relate to be taken after final decrees and after the expiration of more than 30 days. It would not be an unusual or an unjust construction to hold that they do not, because, as in the present case, if the appeal from an interlocutory order appointing a receiver is delayed as it was prior to this class of statutes, the appellate tribunal is left to deal often with mere wreckage; and, as in the present case, ordinarily no advantage comes from a reversal. In view of this last fact, we are quite content that the record shows beyond question that the respondent acquiesced in the appointment of the interlocutory receiver promptly after it was made. While it is true that the terms of the agreement relating thereto, signed by the counsel for the parties and filed in court, and on the same day put into the form of an interlocutory order or decree, did not in express language state that the parties acquiesced in the receivership, yet they were of so radical a character that in equity the respondent cannot deny an implied, if not an express, consent.

Both the agreement and the interlocutory order contained a provision that the powers of the receiver should be those of a permanent receiver until the final determination of the cause; and, what is an emphatic feature, they provided that the bond to which we have referred should be canceled and all liability thereunder terminated. All this is inconsistent in equity with any proposition that the order, or decree, appointing the receiver can now be reversed.

Perhaps we should observe that one of the errors assigned complained that creditors were allowed to intervene and to obtain relief concurrently with the original complainant. This is based on the propositions that the intervening petitioners had filed no proper, sufficient, or legal petitions, pleadings, or statements of claims, and that they had in no way established their right to be made parties. So far as the last branch of these objections is concerned, they did establish their claims before the master to his satisfaction; and, as we have shown, we cannot on this appeal revise the master's doings. The respondent's brief is practically a nullity beyond restating this assignment in general language, and it contains no references to the record required by our rules. All we have been able to find through our own investigation is a motion by the respondent for specifications by the intervening creditors, without anything to show that it was ever brought to the attention of the court. For this and other reasons, the record is insufficient to call on us to review the case so far as this topic is concerned.

The decree of the Circuit Court is affirmed, and the appellees recover their costs of appeal.

(156 Fed. 336.)

NORTHERN PAC. RY. CO. v. WENDEL

(Circuit Court of Appeals, Ninth Circuit. October 7, 1907.)

No. 1,426.

1. MASTER AND SERVANT—ACTION FOR INJURY TO SERVANT—EVIDENCE.

In an action by an employé to recover for an injury resulting from the breaking of a belt used to run a planing machine, the alleged negligence of defendant being the use of a belt which was decayed and defective by reason of its age, it was not error to admit evidence offered by plaintiff to show that the knives of the machine were dull at the time, and the gauge inaccurate, not to establish an independent and different act of negligence, but as showing conditions likely to be met with and affecting the strain on the belt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 920.]

2. SAME—QUESTIONS FOR JURY.

In an action by an employé to recover for an injury resulting from the breaking of a belt alleged to have been due to its age and defective condition, evidence that the breaking might have been due to other causes held insufficient to entitle defendant to the direction of a verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1132.]

3. SAME—ASSUMPTION OF RISK.

A workman, who was injured by the breaking of a belt used to run a machine, due to its weakness from age and from a recent splicing, although he had operated the machine for some years, cannot be held to have assumed the risk from such danger, where it is not shown that he knew the age of the belt, or what the life of such a belt was, or that the splicing would increase its tendency to break.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 575.]

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

4. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where the evidence on an issue of contributory negligence, in an action by an employé to recover for an injury, is conflicting, the question is one for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1132.]

5. SAME—ASSUMPTION OF RISK.

A servant engaged in operating a machine by standing at its side, instead of behind it, where its construction contemplated that the operator should stand, did not thereby assume the risk of injury from the breaking of a belt which was greater there than at the rear of the machine, where there was no obvious danger in the position taken, and in fact no danger at all if the appliances were sound, while the position behind the machine was obviously dangerous from other causes, and it was customary for all operators to stand at the side.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 560.]

6. SAME—DAMAGES—EVIDENCE—EARNING CAPACITY.

In an action by a servant employed as a car repairer to recover from the master for a personal injury, where it was shown that he was a carpenter by trade, on the question of damages, evidence of his disability caused by the injury was not limited to the effect on his earning capacity.

as a car repairer, but it was competent to show the effect on his capacity to earn wages as a carpenter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 490.]

7. MASTER AND SERVANT—INJURIES TO SERVANT—INSTRUCTIONS—EFFECT OF CONTRIBUTORY NEGLIGENCE.

In an action by a servant against the master to recover damages for a personal injury, an instruction that plaintiff's contributory negligence would not preclude his recovery, unless without it the defendant's negligence could not have caused the injury, was not erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 796.]

In Error to the Circuit Court of the United States for the District of Montana.

The defendant in error was the plaintiff in the court below in an action against the plaintiff in error to recover damages resulting from personal injury. He alleged in his complaint that, while employed as a car repairer for the plaintiff in error and operating a planing machine driven by a belt, his right arm was broken by the parting of the belt; that the cause of the breaking of the belt was that it was old, decayed, and defective; that the plaintiff in error had negligently allowed it to remain so, and had negligently failed to box it. The answer denied the alleged negligence, and pleaded contributory negligence, and averred that, as to the unboxed belt, the defendant in error had assumed the risk. On the trial it was shown that the defendant in error was a carpenter of 34 years' experience. For six or seven years he had worked as car repairer in wood and iron in the shops of the plaintiff in error. It was his duty to operate the planing machine, which was the only machine of that kind in the shops, and the one he had always operated, and which he used some times every day and at other times every second or third day. The belt had never been boxed. Just how long the belt had been in use was not proven, but there was evidence that it had been used at least 12 years before the time of the accident, and that it had turned black from age. It had been spliced a short time before the accident, when a piece had been cut off one or both ends, and a new piece had been inserted to restore it to its former length. There was evidence that a belt is weakened by splicing, and that its weakest part is at the point of lacing. It was proven that the life of a belt used under the conditions which attended the use of the belt in question is ordinarily from six to seven years.

Wallace & Donnelly (William Wallace, Jr., of counsel), for plaintiff in error.

Walsh & Nolan and T. J. Walsh (T. J. Walsh and C. B. Nolan, of counsel), for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and DE HAVEN, District Judge.

GILBERT, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

It is assigned as error that the court admitted testimony that the knives of the planing machine were dull at the time when the defendant in error sustained his injury, and that the machine did not cut exactly as indicated by the gauge. The argument is that since the only specification of negligence in the complaint was that the belt was old, decayed, and defective, and that it should have been boxed, it was a variation from the cause of action alleged to permit the defendant in error to prove that the knives of the planer were dull, or that the gauge was inaccurate, and that, if the belt was good enough to stand the

strain of operation when the knives were properly sharpened, or when all the other parts of the machine were as they ought to be, then the duty of the plaintiff in error as to the belt was fully performed. It is true that, in actions for negligence, the rule applies, as in other cases, that the proofs must conform to the pleadings, and that recovery cannot be had on proof of negligent acts other than those specifically alleged, or, in other words, a plaintiff will not be allowed to plead one kind of negligence and prove another. But we do not see that that rule has been violated in the present case. There was proof tending to sustain the allegation that the belt was old, decayed, and defective. There was evidence that it had been in use long after the term of the usual life of such a belt; that it was run at great speed, was subjected to considerable pressure, and had been spliced shortly before the time of the accident; and that the splicing of itself tended to increase the strain. The evidence that the knives were dull was neither offered nor received as proof of negligence, but as proof of one of the conditions attending the use of the belt and the machine. There is nothing to show that the dulling of the knives was not one of the usual or occasional conditions to be reckoned with in the use of such a machine. That the knives were likely to become dull by use would appear to have been a fact to be dealt with in measuring the strength of a belt and in furnishing the defendant in error safe machinery with which to work. It may be true that, if the knives had been kept perfectly sharp, the belt would not have parted. But that fact would not relieve the plaintiff in error of responsibility for not furnishing a belt of sufficient strength to meet the usual and ordinary strain of the work which the defendant in error was called upon to do.

Some of the foregoing considerations are applicable also to the assignment of error that the court denied the motion of plaintiff in error to direct a verdict in its favor at the close of all the evidence. In this connection, the plaintiff in error invokes the doctrine of *Patton v. Railroad Company*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, in which it was said that where the testimony leaves the matter uncertain, and shows that any one of several causes might have brought about the injury, for some of which the employer is responsible, and for others of which he is not, it is not for the jury to guess between these causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion; and it is argued that in the present case there were three possible causes of the breaking of the belt, first, its own weakness, second, too great a strain due to dull knives, and, third, too great a strain due to too deep a cutting resulting from the inaccuracy of the gauge indicator, and that the evidence leaves it uncertain which of these was the producing cause. Whatever may be said of the force of the evidence, we think it is clear that the case was not one to be taken from the jury. As to the age of the belt and its weakness, there was testimony sufficient to go to the jury. Concerning the relation which the gauge bore to the strain which produced the accident, the evidence was conflicting. The defendant in error expressly denied that at the time when the belt parted he was making too deep a cut on the board, or placing an unusual strain on the machine. The question whether or not through a

defective gauge, or otherwise, the defendant in error was making a cut deeper than ought to have been made, was for the jury to answer. As to the dullness of the knives, there is nothing to show that in the use of such a machine the contingency of their dullness was not one of the usual incidents attending the use of a planing machine, and that the strain thereby produced was not to be expected and provided for. In instructing the jury, the court properly confined their attention to the question whether or not the plaintiff in error was negligent in omitting to use due care to provide a reasonably safe belt, and instructed them that if they found that the belt broke because it was old, decayed, or defective, the defendant in error would not be entitled to recover unless the plaintiff in error, through its agents, knew, or in the exercise of reasonable diligence ought to have discovered, that it was old, decayed, or defective, considering the work which it was expected to accomplish and the strain that might be put on it. There was evidence that the belt parted by tearing out the holes where it was laced in splicing, and the court instructed the jury that the burden was upon the plaintiff in the action to show by a preponderance of the evidence that the belt parted or broke because of the tearing out of the holes, rather than the breaking of the lacing.

One of the grounds on which it is said that the court should have directed the jury to return a verdict for the plaintiff in error is that the defendant in error assumed the risk, and that he had had long experience in operating the machine and knew how to loosen the belt by means of the feed lever and thereby relieve the strain. To this it is to be said that there is no evidence whatever that the plaintiff in error knew how long the belt had been in use, or what the life of such a belt was, or what strain it would sustain, or that the splicing of the belt would increase its tendency to break. If he had knowledge of these things, it was for the plaintiff in error to produce the evidence thereof. It will not be presumed that he knew, and the trial court would not have been justified in ruling that the defendant in error assumed such risk.

But it is said that the case should have been taken from the jury on the ground that the evidence showed the defendant in error to have been guilty of contributory negligence, in that he tried to make too deep a cut with the planer, and that he stood beside, instead of behind, the machine. The defendant in error testified that the plank was a little over two inches thick, and that to reduce it to an inch and three-quarters he divided it into two cuts, but that he did not remember what thickness of cutting he set the gauge for on the particular cutting which was being made when the belt broke. He testified further:

"I don't think that a quarter of an inch or an eighth of an inch, or even half an inch, would bring about a strain on the machine if it was in good order. If it was hard wood, it would be harder to plane if the thickness was increased. As a rule, the strain is the same in taking off a sixteenth of an inch or an eighth of an inch or a quarter of an inch. There is no difference to speak of."

One of the witnesses for the defendant in error testified that a fair cut upon a machine of that kind would, on that particular width of timber, be an eighth of an inch. Another testified that similar ma-

chines cut to the depth of five-eighths of an inch, and that one-half an inch is very common. A witness testified that he measured the thickness of the particular cut which was being made at the time of the accident, and found it to be a quarter of an inch. Another testified that he measured the cut and found it was five-sixteenths of an inch. Surely, in view of this conflict in the testimony, there was no question of law presented to the trial court as to the contributory negligence of the defendant in error in setting the machine to make too deep a cut.

As to the position in which the defendant in error stood while operating the machine, he testified that it was more dangerous to stand behind the machine than at its side, and one witness, a machinist, testified that "a man would be a fool" to stand behind the machine when it is in motion. There was competent evidence that the men in the shop operating the planer always stood at the side of the machine. In *Prosser v. Montana Central Ry. Co.*, 17 Mont. 372, 43 Pac. 81, 30 L. R. A. 814, it was said:

"But when it does not appear that the act is positively negligent, we are of opinion that it is competent to show the usage or custom of competent and prudent persons in performing the act. In the case at bar, it did not appear that the act of plaintiff was negligence per se. He carefully performed his duties with the means supplied him for their performance, and we think it was competent to show, under those circumstances, that persons experienced in the performance of the same act, under the same circumstances, performed it as did the plaintiff."

But it is urged that the defendant in error did not stand in the position which the construction of the machine contemplated that he should stand; that he chose a different place, and thereby created a hazard of being struck by the broken belt; and that his selection of a position by the side of the machine could not be justified, either by the fact that others had done so before him, or that the hazards of the position at the rear of the machine, though different, were greater than those at the side. In support of this argument, *Demers v. Deering*, 93 Me. 272, 44 Atl. 922, is cited. In that case it was held that the relative rights and duties of master and servant arise from the contract of employment, and that if a servant worked in a place not appointed by the master, and so not within the purview of the contract, the latter did not owe the former any duty with respect to that place, for the servant took whatever risks there were, and, if the occupation were apparently hazardous, he would be guilty of contributory negligence, and could not recover if his own negligence contributed to the injury. The court said:

"But the plaintiff contends that the place where he stood was the usual place that men had stood in before that time, doing the same work; that the defendant knew it was the usual customary place; and that, by setting the plaintiff to work without instructions, the latter had a right to assume that he was expected to work where those before him had worked. * * * But, assume it to be so. The plaintiff even then assumed, not only the risks naturally incident to the business, but also the obvious risks of working in that place. * * * And it seems to us obvious that a man standing between the rolls along which all the products of the rotary saw must be pushed, as this machinery was situated, was likely to be struck by it."

That decision was made with reference to the facts of the case before the court, in which it appeared that the plaintiff had been injured by a plank pushed along the rolls which carried the product of a rotary saw. The movement of the product of the saw was referred to as an obvious risk visible and apparent to the operative. In the present case, there was no such obvious risk. There was no risk at all, so far as the evidence goes, if the appliances of the plaintiff in error had been sound and such as they should have been. On the other hand, the position behind the machine was a dangerous one, and attended with obvious risks. It was in evidence that the defendant in error had once been standing there when a plank which was being planed flew back and injured him so seriously that he was not able to work for a year, and there was evidence that, in the position behind the machine, an operative would have been obliged to stand close by a rapidly revolving shaft, and would have been in peril of having his clothing caught therein. In view of the fact that there was no obvious or apparent risk in the position which the defendant in error and the other operatives of the mill occupied when using the planing machine, we think that it was not only permissible for the defendant in error to choose the position which appeared the least hazardous, but that it was his duty to do so in the exercise of ordinary and reasonable care for his own safety.

It is contended that the court erred in admitting testimony as to the impairment of the capacity of the defendant in error to work as a carpenter at his trade, by reason of the injury which he sustained. The objection to this testimony was that the only impairment of the capacity of defendant in error to labor which had been pleaded was as to his capacity as a car repairer. The evidence so admitted was that of a witness, who testified that, after the defendant in error was hurt, he could not earn carpenter's wages. The testimony, as we regard it, was offered as evidence of physical disability resulting from the injury. It had been shown that he was a carpenter by trade. It is true that when injured he was working as a car repairer, but that may be regarded as a branch of carpenter's work. The complaint did not allege loss of capacity as car repairer, or of any particular capacity, but alleged damages in general. It was not error therefore to admit the evidence so objected to.

Error is assigned to the refusal of the court to instruct the jury that if the defendant in error was at fault in any manner, however slight, he could not recover, and it is contended that the instruction which the court gave to the effect that, despite his contributory negligence, the plaintiff could recover, unless without it the defendant's negligence could not have caused the injury, is the declaration of a doctrine of comparative negligence, which, while recognized in some states, is denied in Montana, and generally in the states of the Union. In answer to this, it is sufficient to say that the instruction so given was entirely in harmony with the doctrine approved in *Delaware, etc., Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213, and *Railroad Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506, and it is not contrary to the decision in *Wastl v. M. U. Ry. Co.*, 24 Mont. 160, 61 Pac. 9, cited by the plaintiff in error.

The judgment is affirmed.

(156 Fed. 342.)

KATAHDIN PULP & PAPER CO. v. PELTOMAA.

(Circuit Court of Appeals, First Circuit. October 1, 1907.)

No. 697.

1. DAMAGES—PLEADING AND PROOF—PERSONAL INJURIES.

Under a declaration, in an action for personal injury, which describes the wounds received by plaintiff, evidence is admissible, under the settled rules stated in Chitty on Pleading, 411-414, with respect to injuries not described, but which naturally resulted from such wounds, as affecting the amount of damages recoverable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 441, 442.]

2. APPEAL AND ERROR—RESERVATION OF GROUNDS OF REVIEW—EXCEPTIONS.

An exception by a defendant to testimony brought out by him on cross-examination of a witness for plaintiff, and a motion to strike out such testimony, are insufficient under the circumstances according to the practice of the federal courts to raise any question for review by the appellate court, where the record does not show that any grounds for either were given or any reason shown why the testimony was improper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1141.]

3. TRIAL—INSTRUCTIONS—CONSTRUCTION OF CHARGE AS A WHOLE.

In an action by a servant against the master to recover for a personal injury alleged to have been caused by a defective appliance furnished by the defendant, expressions used by the court, in its charge, that, under the circumstances, it was the duty of defendant to furnish and maintain reasonably safe appliances, are not ground for reversal, where the duty of defendant was elsewhere explained as not being absolute, and where at defendant's request the jury were specifically instructed at the close of the charge that it was the duty of the defendant only to use reasonable and ordinary care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-717.]

In Error to the Circuit Court of the United States for the District of Maine.

For opinion below, see 149 Fed. 282.

George E. Bird (E. C. Ryder and William M. Bradley, on the brief), for plaintiff in error.

William A. Pew, Jr. (William H. Gulliver, on the brief), for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. Throughout we will speak of the plaintiff below and the defendant below as the plaintiff and defendant. This case was tried to a jury with a verdict for the plaintiff. It was claimed that the plaintiff was employed by the defendant, and, while in that employment, was using a derrick which was supplied by the defendant as a complete derrick, and that one of the guys was weak through age, and therefore broke, so that the derrick fell on the plaintiff and injured him. The court having properly instructed the jury on the question whether this derrick was to be regarded as a completed structure furnished as such by the defendant, the verdict obviated all questions

except such as arose out of the conditions by virtue of which it was so to be regarded. Six alleged errors were assigned, but only three are brought to our attention.

The allegations in the declaration of the damages suffered by the plaintiff are as follows:

"That by reason of the said falling of said derrick the said plaintiff was greatly injured on the head and shoulders, by the infliction of a deep and painful wound, his left arm was broken in two places, and he was otherwise greatly injured in other parts of his arms, legs, and sides, and that the said plaintiff suffered great pain in body and mind as the result of said injuries, and is permanently injured, and is unable to perform any manual labor, and is deformed and crippled for life, and has been put to great expense for medical attendance, nursing, and medicine, to the damage of the plaintiff in the sum of \$10,000, which shall then and there be made to appear with other due damages."

There was no allegation of a nervous disturbance, or of any injury to the nervous system. Evidence was offered, and admitted against the objection of the defendant, tending to show that the external wounds described in the declaration were the cause of certain nervous disturbances and of other internal injuries. Exception was duly saved, but the exception clearly is not sustainable according to the decisions of the courts in Maine, which state composes the district in which the injury was suffered and the judgment rendered. There was enough in what the declaration contained to be equivalent to the ordinary *alia enormia*; and, without that, inasmuch as the injuries to which the evidence objected to related not only resulted from the wounds described, but naturally resulted therefrom, the thoroughly settled rules of the common law, which are also fully accepted in Maine, determine that no specific description thereof was required. *Chitty on Pleading*, 411* to 414*.

While the plaintiff was endeavoring to prove that one King, who was employed by the defendant, was a vice principal, and not a fellow servant, a question was put on that topic referring to a date later than that of the injury. This was objected to as irrelevant, and as having a tendency to confuse the jury by reflected light on the question of King's relations to the defendant at the essential time. This evidence was apparently irrelevant; but it could not have been at all injurious, because the case so shaped itself that it was wholly nonessential whether King was a fellow servant in the ordinary sense of the word, or a vice principal in the ordinary sense of that word. Under the law as ruled in the federal courts, this could not have been an important question in the present aspect of the case. *Baltimore & Ohio Railroad Company v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; *Central Railroad Company v. Keegan*, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. Ed. 418; *McPeck v. Central Vermont Railroad Company*, 79 Fed. 590, 25 C. C. A. 110, decided by us on March 23, 1897; *Stevens v. Chamberlain*, 100 Fed. 378, 40 C. C. A. 421, decided by us on February 2, 1900.

Another proposition brought to our attention is that the testimony of one of the plaintiff's witnesses, brought out on the cross-examination by the defendant, in regard to the number of guys suitable for a derrick, should have been stricken out on a motion which the defend-

ant made for that purpose. The record shows that an exception was taken, but it does not show any reason given to the court by the defendant why he claimed that the evidence should be stricken out; nor does it state the grounds of the exception. Therefore the record does not disclose that it was shown to the Circuit Court that in any aspect of the case the evidence would have been improper even if put in by the plaintiff. The objection and the exception are insufficient under our practice, and all the more so in view of the fact that the evidence was put in by the defendant itself, so that the question whether it should be stricken out or not was *prima facie* one for the discretion of the court at *nisi prius*.

The remaining question relates to the law as to the nature and extent of the care required from the defendant, growing out of the fact that the derrick was furnished by it to the plaintiff and his fellow workmen as a completed structure for use by them. There is no doubt as to the rule of the federal courts on this topic. It has been rehearsed again and again, and as correctly as anywhere in *Hough v. Railway Company*, 100 U. S. 213, 218, 25 L. Ed. 612, as follows:

"To guard against misapplication of these principles, we should say that the corporation is not to be held as guaranteeing or warranting the absolute safety, under all circumstances, or the perfection in all of its parts, of the machinery or apparatus which may be provided for the use of employes. Its duty in that respect to its employes is discharged when, but only when, its agents whose business it is to supply such instrumentalities exercise due care as well in their purchase originally, as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employes."

There is no claim that this rule was not given by the learned judge of the Circuit Court, and the question before us arises out of the fact that he dropped into an expression which the defendant says is not consistent with the rule, so that it also says that the whole tended to confuse the jury. Thus the defendant seeks to bring itself within *Bank of Metropolis v. New England Bank*, 6 How. 212, 226, 12 L. Ed. 409, to the effect that, where the instructions are involved, a new trial will be ordered; and, also, within *Armour & Co. v. Russell*, 144 Fed. 614, 615, 75 C. C. A. 239, decided by the Circuit Court of Appeals for the Eighth Circuit on March 21, 1906, where it is stated that the vice of a wrong rule in a charge is not extracted by the fact that the right rule is also given, "because," as the court says, "it is impossible to tell by which rule the jury was governed."

This objection, however, melts away on a careful examination of the record. The defendant admits that the correct rule was given five times, while it claims that the alleged incorrect rule was also given six times. It will be found, however, that what the defendant claims to be the incorrect rule was accompanied every time with what is admitted to be the true rule, and that finally the true rule was given absolutely and unqualified by anything else. We will give the first example of what the defendant rests on in this connection. It gives undoubtedly the most plausible support to the defendant's position of any extract which can be made from the charge. It is as follows:

"Now, the master, the employer of laborers, has a duty upon him to see that a reasonable place is given to the laborer in which to work. He is not an

insurer of that place, but it is his duty to give him a reasonably safe place in which to work. It is his duty, also, to give him reasonably safe appliances with which to work. In this he is not an insurer. A reasonably safe appliance may break, but it is the duty of the employer, the master, to provide the servant, the employé, with reasonably safe appliances, and the place of work and the appliances must be reasonably safe when you take into consideration the nature of the work, the character of the occupation. It is not sufficient for the plaintiff, the employé, who sues the master, to show that an accident happened. He must show that it happened through the neglect of the employer, through his failure to exercise reasonable care in furnishing a suitable place or a suitable appliance; that either a suitable place was not furnished; or that by reason of such want of reasonable care he, the employé, the servant, suffered."

If this stood alone, it might perhaps be held to be subject to the criticisms of the cases we have cited. The next instance on which the defendant relies is as follows:

"Now, starting with the instructions which I have given you as to your duty. If he has satisfied your mind on that proposition, that the defendant company had not reasonably met that duty of providing a suitable appliance, namely, a suitable rope to the derrick, and that, through its neglect to provide that, the plaintiff has suffered, so far he may recover, so far as that proposition is concerned."

This is fairly subject to the same observations as the first extract we have given. Subsequently to the above, the court said:

"It is the duty of the defendant company, and of any person employing men, to provide reasonably suitable appliances; as I have said, they are held to reasonable care in this behalf."

This exhibits in a succinct form the features in the charge to which the defendant objects. The following extract, however, which succeeds in the charge all we have stated, must be held, of course, to supersede what the court had already said, and fairly exhibits the extent to which the defendant's criticisms can be applied:

"I instruct you that, from the testimony in the case, you are justified in finding that Mr. Jones was the general manager of the defendant company; that he had general charge of the company's business. Among other things, he had the duty of seeing that a reasonably safe working place was maintained for its employés and servants, and that reasonably safe appliances were furnished them, for their work. In the performance of this duty as general manager he was not a fellow servant of the plaintiff, but was a vice principal and representative of the defendant company. If he was negligent in the exercise of these duties, the jury is justified in finding defendant liable. If the general manager, the vice principal of the defendant, knew, or from the nature of the case ought to have known, that the guy line of the derrick was not reasonably safe for use, and, knowing such condition of the guy line, he did not have such line removed, or if he negligently sanctioned its use under circumstances when the guy was likely to break and cause injury to the employés of the defendant company, and if the jury finds that he was guilty of negligence in this behalf, they are justified in finding such negligence to be the negligence of the defendant company. If the injury happened through the breaking of a guy, and if that guy was defective and unsafe, and if its appearance was such that the defect might have been discovered by the exercise of reasonable care on the part of the general manager, the vice principal of the company, and if he failed to discover the defect in the guy or to remedy the same, such failure the jury may take into consideration as evidence tending to show negligence on the part of the defendant company itself."

While the first extract we have given from the charge might be subject to the criticism found in *Bank of Metropolis v. Union Bank*, this full and careful explanation to the jury is not; but, if subject to any criticism, it is to that found in *Armour & Co. v. Russell*, on the point that inconsistent rules were given. The defendant rests on the proposition that the word "duty" was so used as to leave the jury an opportunity of understanding that the duty is not a qualified one; but this is not the fair interpretation to be put on this method of expression. It is impossible for either courts, or any human agency, dealing with the English language, to use words or terms which in all respects qualify and limit their application as they should be qualified and limited, without additional expressions intended so to qualify and limit it. When the learned judge used the word "duty," it was used in a general sense, covering both qualified and unqualified obligations; and immediately, and almost in the same breath, he went on to explain to the jury that the duty is not unqualified, but is qualified in the way in which he explained. In this respect the court followed an ordinary method of expression among men using common phrases, and, also, with men of the highest literary exactness. The Supreme Court proceeded in the same way in which the learned judge proceeded in *Union Pacific Railroad v. Daniels*, 152 U. S. 684, 689, 14 Sup. Ct. 756, 38 L. Ed. 597. At the middle of page 689 of 152 U. S., of page 758 of 14 Sup. Ct. (38 L. Ed. 597), the opinion quoted the words "owes a positive duty," without any qualification whatever. And, again, at the foot of the page, it used equally positive language of a generic character.

At bar, after the judge completed his charge, the counsel for the defendant said to the court as follows:

"We would ask, if your honor please, that you charge the jury that it is only the duty of the defendant to use reasonable and ordinary care to provide a reasonably safe place and a reasonably safe appliance."

The court replied as follows:

"I give you that instruction, gentlemen. I repeat, I give it to you coupled with what I have already said."

It is, perhaps, true that, under the circumstances, the defendant was entitled to the instruction clean, without any addition, or any reference to what the court had previously said. Nevertheless, it is not clear what the court meant by that reference. The defendant maintains that it referred to the previous expressions which the defendant contends indicated that there was an absolute duty on the part of the defendant. The plaintiff says it referred to that part of the charge which immediately preceded the request made by the defendant, and which related to the question whether or not the derrick was a completed structure furnished as such by the defendant. To this time, however, there had been no exception taken to the charge. One was taken here, and that was limited, and limited in a way which we do not understand. It was as follows:

"We would like to object to that portion of the charge just now given in which it is stated that the instructions heretofore given this morning are the same as just now given as to the duty of the master to employ reasonable and ordinary care to provide reasonably safe appliances for the workmen."

We do not find that the court anywhere stated as said in that exception. We do not understand the exception, and we presume the court did not understand it. However, the matter seems to have been fully cleared up subsequently. The objection was restated by the defendant as follows:

"We would like, if your honor please, to have an instruction to the effect that it is only the lack on the part of this defendant to use ordinary and reasonable care to discover the defect that can render it liable; not that it is an insurer; not that it is a guarantor; but that it must from time to time, from day to day, exercise reasonable care to discover defects."

Thereupon the court said as follows:

"I told you [meaning undoubtedly the jury], in terms, that the defendant company was not an insurer of the appliance, but that it should use ordinary care in supplying a suitable appliance; that, if defects occurred, it should use ordinary care in discovering those defects; and that it is responsible only for ordinary care in that behalf."

Here we have finally the precise rule of the law and the precise rule claimed by the defendant, whatever suggestions may be made as to what preceded. The court thus met the requirements of *Livingston v. Maryland Insurance Company*, 7 Cranch, 506, 544, 3 L. Ed. 421, and *Canney v. Walkeine*, 113 Fed. 66, 68, 51 C. C. A. 53, 58 L. R. A. 33. We do not see how the jury could have misunderstood this, or how, after this, it can be said that there was any error in the charge of the court; and we perceive no error in the record in any particular to which our attention has been called.

The judgment of the Circuit Court is affirmed, with interest, and the defendant in error recovers his costs of appeal.

(156 Fed. 347.)

MISSEL v. LENNOX et al.

(Circuit Court of Appeals, First Circuit. October 1, 1907.)

No. 703.

LANDLORD AND TENANT—NEGLIGENCE—DANGEROUS ELEVATOR IN BUILDING—INJURY TO TRESPASSER.

Defendants were the owners of a building consisting of several floors leased to tenants engaged in the manufacture of shoes. There were two stairways reaching to the several floors from different sides of the building, and on another side was a freight elevator, the entrance to which opened on the street. There was no stairway from said entrance, and there was a sign on the elevator shaft reading, "For freight only." Plaintiff was a shoe workman, and, seeing a sign on that side of the building that vampers were wanted, asked a teamster the way into the building, and the teamster, who was going up with some leather, took plaintiff with him in the freight elevator. Plaintiff was told to return the next day, which he did, going down and coming back with some one who was using the elevator. On the second day, not having been employed, when he wished to go down, there was no one at the elevator, but the door of the shaft was open, and he stepped in upon a trapdoor, which he supposed was the elevator. In a moment the elevator ascended, opening the trapdoor, and plaintiff was caught and injured. By the provisions of the leases, the operation of the elevator was left entirely to the tenants, who kept no one in charge, but each used it when occasion required. It was rarely used except by some one bringing up or taking down freight. *Held*,

that plaintiff was not in the elevator by invitation of defendants or their tenants, either express or implied, and therefore defendants owed him no duty of care, and were not liable for his injury.

In Error to the Circuit Court of the United States for the District of Massachusetts.

Sherman L. Whipple (Alexander Lincoln and Whipple, Sears & Ogden, on the brief), for plaintiff in error.

Romney Spring (Mathews, Thompson & Spring, on the brief), for defendants in error.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

COLT, Circuit Judge. This is an action of tort to recover for personal injuries, and the case is now before this court on writ of error. At the conclusion of the evidence, the court below directed a verdict for the defendants, and the assignments of error all relate to this ruling.

The plaintiff, while seeking employment, was injured by stepping on the hatches of a freight elevator well in a building owned by the defendants, but which was leased to several tenants engaged in the manufacture of shoes.

The building is located in the city of Lynn, and is shaped like a blunted V, with the front on Liberty Square, one side on Broad street and the other side on Union street.

The entrance to the elevator shaft in which the accident happened was on Broad street. In the entrance there were no stairs leading to rooms on the upper floors, and no doors leading to rooms on the first floor. It was simply an entrance to the freight elevator. There were, however, front stairs on Liberty Square leading to the top of the building and back stairs near the engine room in the rear of the building.

Inside the entrance to the elevator, and close to it, was the sign, "For freight only." There was testimony that on the outside of the building near this entrance was a signboard, on which was placed a sign, "Vampers Wanted."

The leases contained the provision, "including the space on this floor used for stairways, halls and elevators," and also the following provisions:

"The lessee shall have the use of the stairways, hallways and elevators in common with the other tenants of said building. * * * The lessors agree to furnish heat and power at all times during the continuance of this lease, excepting nights, Sundays, and legal holidays, and except in case of fire, unavoidable casualty, accidents, strikes, and twenty-four hours each year for inspection and cleaning out of boilers, to properly heat demised premises, and to properly run the elevators and whatever shafting it may be desired to run in said premises."

The elevator well was inclosed by a sheathing, with doors on two sides on each floor. The elevator itself was merely a platform without sides, with a bar overhead, from which the elevator was supported. Trapdoors, or hatches, were placed on every floor, which were opened by an iron hoop over the top of the elevator as it ascended, and by arms on its sides as the elevator descended. There were signal bells for the elevator on each floor. These bells were not automatic, but would ring

when a button was pushed. There was also evidence that the noise made by opening and closing of the hatches, as the elevator ascended or descended, could be heard for at least two floors.

The inspector of public buildings testified that when this elevator was put in use he inspected it and approved of it, and that it was equipped in the same manner at the time of the accident. There was further testimony that elevators constructed in the same way were common in the city of Lynn. The plaintiff contended, however, that the elevator was defective in its original construction, in that it was not equipped with such devices as were required by section 27 of chapter 104 of the Revised Laws of Massachusetts:

"Elevators used for carrying freight shall be equipped with a suitable device which shall act as a danger signal to warn people of the approach of the elevator. * * * All the above construction work and devices shall be approved by the inspectors of factories and public buildings, except that in the city of Boston they shall be approved by the building commissioner, and in other cities by the inspector of buildings; but, upon the approval of said commissioner, or inspector of buildings, or inspector of factories and public buildings, any elevator may be used without any or all of such appliances or devices if the nature of the business is such that the necessity for the same will not warrant the expense."

The plaintiff was a Russian, and a vumper by trade. According to his story, on the day before the accident he was passing along Broad street, accompanied by his brother-in-law, when they noticed the sign, "Vumpers Wanted," on the outside of the building. The plaintiff thereupon asked a teamster how to get upstairs. The teamster said:

"Wait; I am going to take up some leather, and I will take you upstairs on the elevator."

The teamster stopped the elevator at the third floor, and knocked on the door, and somebody opened the door. The plaintiff went out and asked where the stitching room was, and saw the forewoman of the stitching room, who told him to wait a few minutes until she got a machine ready for him; so he sat down and waited about half an hour. Then she came up to him and told him that she was very busy, that the machine required some repairing, and to come the next day. So he went to the elevator again and saw a man who was taking down some cases of shoes, and they went down together.

The next day, about 9 or 10 o'clock, he went back alone to the same place. When he got to the elevator he found nobody there, but waited until a boy came, who was going upstairs, and who took him up two flights, when he got out of the elevator and went to the stitching room. There he saw the woman in charge of the room, who told him that the machine did not run, and said: "Therefore, I have no work for you."

When the plaintiff came to the place where the elevator ran, he found the door open, and went in, thinking he was entering the elevator. It was dark inside, and the trapdoors on which he stepped looked just like the floor of the elevator. Before he stepped in he heard no bell or signal of warning that the elevator was approaching.

As soon as he entered, the doors from below began to open. At first he thought that the elevator was beginning to go up. Then, as the doors kept rising, he fell and was caught with one leg between the door and the wall of the elevator, and in consequence his leg was crushed.

The elevator did not open into the stitching room, but into the cutting room. To get from the elevator to the stitching room it was necessary to go through the door from the cutting room to the stock fitting room, and through another door from the stock fitting room to the stitching room. There was, however, an entrance to the stitching room from Liberty Square by means of stairs.

With respect to the use of the elevator, Francis A. Cummings, a witness in the employ of Randall-Adams Company, one of the tenants, and called by the plaintiff, testified as follows:

"He had seen using the elevator anybody who had business on it, like expressmen or people going after shipments of goods above him, or anything like that; that he had seen them coming up there after bags of leather and bags of rags and sometimes shoes and shipments of shoes; that there had been times when boys and men went up there to go into the different departments of the factory; that he had seen people coming up bringing bundles, packages, and things; that he would see such people using the elevator and coming from it on to the floor every day; that while he was there he never saw any one in charge of the elevator and operating it or running it regularly who was hired for that purpose."

From the foregoing evidence, it appears that when the defendants leased this building to the several tenants they intended that this elevator should be used exclusively for freight, and not for passengers or persons seeking employment. This is evident from its construction, equipment, and from the notice, "For freight only." It further appears that the building was provided with suitable means of ingress and egress in the form of front and back stairs leading to all the floors.

We also think it clear that under the provisions of the leases the control of the elevator was left with the tenants, and that at the time of the accident the Randall-Adams Company, who occupied the entire third floor, were in the possession of the doors leading to the elevator and of the hatches upon which the plaintiff was injured. The plaintiff, however, does not view this question of control as material upon the ground that the particular defect of which he complains, and of which, as he contends, there was evidence to go to the jury, was in the original construction of the elevator, and that for such a defect the responsibility always rests with the owners, notwithstanding they may have leased the entire building and thereby parted with all control of the elevators. *Larue v. Farren Hotel Company*, 116 Mass. 67; *Shipley v. Fifty Associates*, 106 Mass. 194, 8 Am. Rep. 318; *Dalay v. Savage*, 145 Mass. 38, 12 N. E. 841, 1 Am. St. Rep. 429; *Shepard v. Creamer*, 160 Mass. 496, 36 N. E. 475.

But, aside from and independently of these considerations, it is conceded that, in order to maintain this action, the plaintiff must show either an express or implied invitation extended to him by the defendants to use the elevator at the time he was injured, since, in the absence of any such invitation, the defendants owed the plaintiff no duty with respect to the construction and condition of the elevator, and cannot therefore be chargeable with negligence. *Sweeny v. Old Colony & Newport Railroad Company*, 10 Allen, 368, 87 Am. Dec. 644.

We have to determine therefore, whether there was any substantial evidence upon which the jury might have found either an express or implied invitation by the defendants.

The only evidence of an express invitation is that the woman in charge of the stitching room told the plaintiff to come the next day. While this may be regarded as an express invitation by the tenant, authorized by the defendants, to visit the building by the usual means of ingress and egress provided, namely, the stairways, it cannot be held to be an invitation to use the freight elevator for such a purpose. In this connection, it may also be observed that there were stairs leading to the street which were directly connected with this stitching room, and that in order to reach the freight elevator from this room it was necessary to pass through the stock fitting room to the cutting room.

It remains to consider whether there was evidence which should have been submitted to the jury of an implied invitation arising (1) from the general use of the elevator for purposes other than freight, and (2) from the situation and appearance of the premises.

If the evidence had tended to show an open, general, and well-known use of the elevator for passengers, it might have been presumed that this was done with the knowledge, acquiescence, and consent of the defendants. But the proofs fail to support any such proposition. The entire evidence on this point is contained in the testimony of Cummings, which is cited above. This testimony, at most, shows that there may have been a casual use of the elevator for purposes other than freight. It is also significant in this connection to note that the first time the plaintiff went up in the elevator it was with a teamster who was taking up some leather, and that when he came down on the elevator on this occasion it was with a man taking down some cases of shoes; and, further, that the next day, when he came back, he waited until a boy came who was going upstairs and who took him up to the third floor.

As to an implied invitation arising from the situation and appearance of the premises, the plaintiff relies, first, upon the fact that there were no means of access to the different floors in or near the freight elevator entrance other than the freight elevator; the stairs being located on another street or in the rear of the building. Since this was a freight elevator, with the proper notice that it was to be used for freight only, we do not consider the circumstance that the stairs were located at some distance on another side of the building has any bearing on the question of an implied invitation by these defendants to use this elevator for ordinary passenger service.

The plaintiff also relies upon the evidence of a signboard with a sign, "Vampers Wanted," on the outside of the building near the entrance to the elevator, as tending to prove an implied invitation. Upon this point it may be said, first, that there was no evidence that the defendants had any knowledge that this notice or similar notices were ever placed on the building near the elevator entrance.

Again, if we assume that some of the tenants had placed this notice on the outside of the building, this circumstance would not be sufficient, upon the whole state of facts presented in this case, to charge the owners of the building with an implied invitation to persons seeking employment of the tenants to make use of this elevator as the proper means of ingress and egress to and from the building.

Upon full consideration of the whole evidence, we find no error in the ruling of the Circuit Court.

The judgment of the Circuit Court is affirmed, and the defendants in error recover costs in this court.

(156 Fed. 352.)

GREEN v. DAVIS.

(Circuit Court of Appeals, Sixth Circuit. October 28, 1907.)

No. 1,663.

EJECTMENT—SUFFICIENCY OF PETITION—DESCRIPTION OF LAND.

It is permissible for a petition in ejectment to describe the land sought to be recovered as all of a certain tract, except portions thereof embraced in prior grants and patents from the state; but in such case, to support a judgment for the plaintiff, the parts excluded must be accurately described.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, §§ 158-164.]

In Error to the Circuit Court of the United States for the Eastern District of Kentucky.

W. O. Harris, for plaintiff in error.

Lewis Edelen, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was an action in ejectment to recover from George Green and numerous other defendants certain lands embraced within the exterior boundaries of a patent issued by the state of Kentucky, September 25, 1845, on a survey dated March 3, 1845, to Ledford, Skidmore & Smith, which called for 86,000 acres. This land was situated in the southeastern part of Kentucky. Its boundaries were defined by this court in the case of *Bramblett v. Davis*, 141 Fed. 776, 72 C. C. A. 204. They include a parallelogram about 25 or 26 miles long and 5 or 6 miles wide. The present suit was brought to eject those persons who now wrongfully occupy the part of the original patented tract which still belongs to Davis, as trustee, under conveyance from the original patentees. The petition alleged that Davis, as trustee, was the owner and entitled to the possession of the original tract of 86,000 acres, describing it by the boundaries set forth in the patent, with the following exceptions:

"But excepting therefrom such portions thereof as are embraced within the valid surveys or patents made or issued prior to March 3, 1845, and further excepting therefrom such portions as are embraced within" certain deeds described in the petition—some made by Ledford, Skidmore & Smith, and some by Naomi Lawton Davis.

The defendant Green moved the court to require the plaintiff to make the petition more definite and certain by describing the part or parts within the exterior bounds of the patent set out in the petition which were claimed and sought to be recovered by the plaintiff. He also filed a special demurrer on the ground that the petition did not state that the matter in controversy between the plaintiff and him ex-

ceeded the sum or value of \$2,000, and, finally, a general demurrer on the ground that the petition did not state facts to constitute a cause of action. These objections were overruled, an order was made continuing the cause, there having been an order of survey made, and then an amendment to the petition was filed which reads as follows:

"Comes now the complainant, Charles Henry Davis, trustee, etc., and by leave of court amends his petition hereln, and for amendment states: That the tracts of land excluded from the exterior boundaries of the Ledford, Smith & Skidmore 86,000-acre patent described in the petition for which patents have been issued prior to the date of that patent are so numerous that they could not reasonably be set out in the body of this amendment without great prolixity. For this reason, and for the greater convenience of the court and of the parties to this suit and all concerned, the complainant files herewith as part hereof an exhibit, marked 'X-9,' to which he refers and makes it part hereof as fully as if the same were herein set out, which exhibit shows the patents senior to the aforesaid Ledford, Smith & Skidmore patent, which conflict in whole or in part with that patent, so far as the complainant has been able to ascertain. Complainant says he cannot state with certainty that each of the patents contained in the said exhibit does actually conflict with the said Ledford, Smith & Skidmore patent; but from the best information he has on the subject, in the absence of an actual survey of said patent, he believes that each of them does to some extent conflict with said patent. It is impossible, though, for the complainant to state positively or accurately to what extent the said patents do so conflict, or that all of them conflict at all, without an actual survey of the said 86,000-acre tract, such as has been ordered to be made in this case, for the reasons, amongst others, that many of the aforesaid senior patents described in said exhibit will be found to conflict with each other, in some cases as many as three of said patents will be found to overlap each other to a greater or less extent, and others of them are so indefinite in their descriptions that they will be held to be utterly void and not valid as supporting title senior to the title of the complainant for any land whatever; but to what extent and in what numbers the said senior patents contained in the aforesaid exhibit do overlap each other, and to what extent and in what number they will be found to be void for uncertainty in the description, the complainant is unable to state positively until after the completion of the survey which has been ordered by the court in this case. The complainant alleges, therefore, that the patents referred to and described in the aforesaid exhibit are all the senior patents which he has been able to find, believing them to be located in whole or in part within the said 86,000-acre patent, and it may turn out by the survey that he is mistaken in thinking that all the patents contained in said exhibit are located within the 86,000 acres aforesaid; and the complainant alleges that he files the aforesaid exhibit as containing to the best of his knowledge, information, and belief a true list of the tracts of land which were meant and referred to as exclusions from the complainant's title to the said 86,000-acre tract, but there may be other tracts not described in said exhibit which will turn out to be found located within the 86,000-acre tract that are superior to it, or it may turn out that some of those described in the exhibit as senior will be found not to be senior or superior to the title of the complainant. The said exhibit also contains the full descriptions of all tracts of land referred to in the petition in this case as having been conveyed by complainant and by his predecessors in title, back to and including the patentees, Ledford, Smith & Skidmore. Wherefore the complainant prays that this amendment may be read and considered as part of his original petition, and he prays for the relief therein prayed for."

A package, marked "Exhibit X-9," filed with the amendment to the petition, which contained copies of 434 patents granted prior to the Ledford, Skidmore & Smith patent of 1845, and therefore senior thereto, had upon it the following indorsement:

"This package contains copies of patents senior to the Ledford, Skidmore & Smith patent No. 6,975; also descriptions of deeds excepted in original deed

to Edward M. Davis from Noble Smith, Henry Skidmore, and James T. Loyd, and of deeds made by the Davis family to others, so far as I have been able to determine them without actual survey. It must be understood however: (1) That it is not positively known that all of these patents are inside of Ledford, Skidmore & Smith patent No. 6,975. (2) That there may be others not known to me which upon an actual survey may be found inside. (3) The exact areas, boundaries, or locations of these patents cannot be determined without actual survey made upon the ground. The list is the best which can be produced from our present knowledge, but Mr. Davis will not be held bound for the completeness or accuracy of the list, or the areas excluded thereby.

"Will Ward Duffield."

Following the filing of the amendment to the petition, the defendant Green demurred on the ground the petition did not describe the land sued for so it could be identified, and also on general grounds, and moved the court to require the plaintiff to make his petition more definite and certain by describing the land claimed so that it might be identified. This demurrer and motion were overruled. The defendant Green, declining to plead, moved the court to enter judgment, which was overruled, and then moved the court to require the plaintiff to elect either to proceed to judgment or dismiss the petition. This motion was sustained, and the plaintiff elected to ask for judgment in accordance with the petition as amended. Such judgment was entered for the ownership and immediate possession of the original tract patented to Ledford, Skidmore & Smith, as described in the original petition, "but excluding therefrom the following described tracts described in the plaintiff's petition and amended petition, to wit." Then follows the conveyances and patents set out in the petition and amendment to the petition and superior to the title of plaintiff. The errors assigned are the overruling of the general demurrer and the motion to require the plaintiff to make the petition more specific and certain, and the rendition of the judgment.

The difficulty in this case arises not so much from the allegations of the petition as from those of the amendment subsequently filed. The petition states that the plaintiff was the owner and entitled to the possession of the tract of land granted by Kentucky, on September 25, 1845, to Ledford, Skidmore & Smith, "except the exceptions hereinafter named," and then describes the original patent, and adds:

"But excepting therefrom such portions thereof as are embraced in the valid surveys or patents made or issued prior to March 3, 1845, and further excepting therefrom such portions thereof as are embraced within" certain deeds which are described.

The petition further alleged that each of the defendants had wrongfully and unlawfully and without right entered upon a portion or portions of the land so claimed and owned by plaintiff, and hereinbefore described as embraced within the boundaries of said 86,000-acre tract—"not lying within any of the exclusions therefrom aforesaid, and without right detained the same, the boundaries of which portion or portions of said lands so entered upon and detained by said respective defendants being unknown to the plaintiff."

From all this it clearly appears that the portion of the original Ledford patent which is claimed by the plaintiff and sought to be recovered must be reached by the method of exclusion. This court has al-

ready determined the boundaries of this patent; but a large portion of the tract is covered by patents and conveyances, patents made before the Ledford patent, and conveyances made since by Ledford and his associates and successors. No question is made but that the conveyances made subsequent to the patent are sufficiently described. The prior patents were originally described in the petition in a general way, thus:

"But excepting therefrom such portions thereof as are embraced within valid surveys or patents made or issued prior to March 3, 1845."

We are relieved from considering whether this would have been a sufficient description, because the plaintiff, of his own accord, filed an amendment which made this general averment specific by including in an exhibit, which was made a part of the petition, all the prior patents which conflicted in whole or in part with the Ledford patents, so far as he had been able to ascertain them. The question, therefore, now is whether the petition as thus amended is sufficient. It must be remembered that the only land claimed by the petitioner, the only land which he claims the defendants had wrongfully and unlawfully and without right entered upon and detained, is land "not lying within any of the exclusions therefrom aforesaid," and therefore it is necessary to know what the exclusions are. The land he seeks to recover is land lying within the Ledford patent, but outside of the exclusions; that is, outside of all the prior patents. Now, in the amendment he states, as we have indicated, that he has included in the exhibit all the prior conflicting patents so far as he has been able to ascertain. But he goes on to scatter doubt by saying:

"Complainant says he cannot state with certainty that each of the patents contained in the said exhibit does actually conflict with the said Ledford, Smith & Skidmore patent; but from the best information he has, in the absence of an actual survey, he believes each of them does to some extent conflict with such patent. It is impossible * * * to state positively or accurately to what extent the said patents do so conflict, or that all of them conflict at all, without an actual survey, * * * such has been ordered * * * in this case, for 'these' reasons: That many of the * * * senior patents described in said exhibit 'are' found to conflict with each other, in some cases as many as three * * * will be found to overlap each other, and others are so indefinite in their descriptions that they will be held to be utterly void and not valid as supporting title senior to the title of the complainant; * * * but to what extent and in what numbers the senior patents * * * overlap each other, and to what extent and in what numbers they will be found to be void for uncertainty in the description, the complainant is unable to state positively until after the completion of the survey which has been ordered by the court in this case."

The amendment further states that the plaintiff files the exhibit as containing, to the best of his knowledge, information, and belief, a true list of the tracts of land which were meant and referred to as exclusions from the complainant's title to the said 86,000-acre tract; but there may be other tracts, not described in said exhibit, which will turn out to be found located within the 86,000-acre tract that are superior to it, or it may turn out that some of those described in the exhibit as senior will be found not to be senior or superior to the title of the

complainant. The indorsement by the plaintiff on the package of the prior patents, says:

"It must be understood however: (1) That it is not positively known that all of these patents are inside of Ledford, Skidmore & Smith patent No. 6,975. (2) That there may be others not known to me which upon an actual survey may be found inside. (3) The exact areas, boundaries, or locations of these patents cannot be determined without actual survey made upon the ground. The list is the best which can be produced from our present knowledge, but Mr. Davis will not be held bound for the completeness or accuracy of the list, or the areas excluded thereby."

We understand that the stringency of the old rule is somewhat relaxed, and "*certum est quod certum reddi potest*" (*Glacier Mountain Silver Min. Co. v. Willis*, 127 U. S. 471, 480, 8 Sup. Ct. 1214, 32 L. Ed. 172); but the trouble is that this amendment not only does not furnish the required information, but fails to point us where to get it. The natural method, in an action of ejectment, would have been to describe by metes and bounds the portion of the original patent which was sought to be recovered; but this could not be done without a survey, and no survey had been made. Therefore the method of exclusion was used. This was proper enough. *Maxwell Land Grant Co. v. Dawson*, 151 U. S. 586, 605, 14 Sup. Ct. 458, 38 L. Ed. 279, and the cases cited on the latter page. But, to locate definitely by the process of exclusion, it is necessary to describe accurately the exclusions. This cannot be done by the information contained in the amendment. The exhibit does not assume to set out a complete and accurate list of all the prior patents. It states that some may be missing, that others may be invalid, and that others may overlap, and it does not point out the patents to which these statements refer. The defendants are therefore left in doubt as to the extent of the exceptions, and, since the plaintiff seeks to recover all of the original patents outside of the exceptions, the petition as amended does not inform them of what the plaintiff charges them with wrongfully detaining and seeks to recover. Moreover, this lack of information leaves to the marshal or executive officer of the court, under the judgment, the need and power of determining a complete list of the prior patents, with their validity and location. He may determine whether a patent is within the boundaries of the original patent, whether it was prior and superior, whether it is valid, and the location of the land described by it. We do not believe that, under the law of Kentucky, such judicial power should be vested in the marshal. *Farmer & Arnold v. Samuel*, 4 Litt. 187, 193, 14 Am. Dec. 106. Therefore we hold the court erred in not requiring the petition, with the amendment, to be made more definite and certain.

The judgment of the lower court is reversed.

(154 Fed. 472.)

TWEEDIE TRADING CO. v. GEORGE D. EMERY CO.

(Circuit Court of Appeals, Second Circuit. March 26, 1907.)

No. 235.

SHIPPING—CHARTER HIRE—LOSS OF TIME FROM DEFICIENCY OF MEN.

Under a charter party which required the owner to provide the crew, and provided that, in case of loss of time from deficiency of men, the hire should cease during the detention, the charterer is entitled to a deduction of charter hire during the time the vessel was detained at quarantine in consequence of the illness and infection of the crew, and the requirement of the quarantine officers that a new crew should be shipped before she was permitted to enter the port.¹

Appeal from the District Court of the United States for the Southern District of New York.

See 146 Fed. 618.

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, awarding to the libelant \$317.41 on account of charter hire, paid in advance, of the steamship *Osceola*, which was let to libelant for a round trip to and from certain named foreign ports on the agreement of charterer to pay for her use and hire £900 British sterling per month, and at the same rate for any part of a month. The owners agreed to let the vessel "with full complement of officers, seamen, engineers and firemen for a vessel of her tonnage, and to be so maintained during the continuance of this charter party."

J. Parker Kirlin and Convers & Kirlin, for appellant.

C. S. Haight and Wheeler, Cortis & Haight, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The sole question in the case is whether under the terms of the charter it should be held that the hire ceased from April 10, 1905, at 2 p. m., when she arrived at the quarantine station, New York Harbor, until April 12, 1905, at 9:30 a. m., when she left quarantine for her berth in New York.

The vessel had sailed from Para for Barbadoes with a foul bill of health, and she sailed from Barbadoes for New York in like condition. When she reached the station, she was stopped, the quarantine flag hoisted, and part of the crew, those who were actually sick, were removed to Swinburne Island. Advised of the situation, eight men and two firemen were sent down in a towboat the next morning, arriving so early that they had to wait till the quarantine boat came off and took the rest of the crew on shore. None of the new men were allowed on board by the health authorities until the sick men and those of the crew who had been exposed to infection had all been removed. Then, about 9:30, the new men got to work and brought the ship up to her berth.

The charter provides, *inter alia*:

"That in the event of the loss of time from deficiency of men and stores, breakdown of machinery, stranding, fire or damage preventing the working of

¹ See note at end of case.

the vessel for more than twenty-four hours, the payment of the hire shall cease until she be again in an efficient state to resume her service."

We concur with the district judge in the conclusion that from her arrival at quarantine until the new men were put aboard a deficiency of men prevented the working of the vessel within the meaning of this clause. It is to be noted that this is not a case where, some of the crew falling sick, enough are left to bring her forward on her voyage. The whole crew by reason of exposure to some contagious disease had become disqualified from further prosecution of the voyage. None of them was able to pass beyond quarantine on board that ship. Not only the men who were actually prostrated, but the whole crew, were removed by the health officers, and they ceased to be a part of the ship's company for the prosecution of her voyage beyond quarantine as effectually as if they had died, or deserted, or been arrested as fugitives from justice or been impressed for service elsewhere. She was not in an efficient state to resume her service until she had seamen and firemen on board who could take her up to her berth. In view of the express obligation the owners entered into to maintain a full complement of seamen and firemen, and of the plain and unambiguous language of the clause above cited as to temporary ceasing of charter hire, it seems unnecessary to cite any authorities. We are not impressed with respondent's contention that, if the parties had intended to provide for suspension of hire when time was lost by reason of sickness of the men, they would have used the word "inefficiency," instead of "deficiency." The distinction is too fine. What the parties meant was that she should at all times have on board a complement of men in such condition as to put her "in an efficient state to [prosecute] her service"; and they have chosen apt words to express such intention.

The decree is affirmed, with interest and costs.

NOTE.

Deductions and Offsets from Charter Hire of Vessel.

I. IN GENERAL.

[a] (U. S. 1886) The managing owners of a vessel, wishing to get it into their possession, agreed with the charterers that, if they would accept a charter offered their agent by the master of the vessel to take lumber to New York at \$9 a 1,000 feet, only \$8 a 1,000 should be charged under it. The managing owners represented a majority in interest of the owners, and also held a power of attorney signed by various owners, including the master, which authorized them, *inter alia*, to obtain possession of the vessel and to settle freight bills. The master libeled the lumber to recover the charter price. *Held* that, incident to the authority to settle freight bills, the power of attorney gave authority to agree on a remission, that this authority prevailed over the master's authority, and that the oral agreement prevailed for a remission of \$1 per 1,000 upon the price named in the subsequent written charter, which was signed in part execution of the prior oral agreement.—*Wall v. Ninety-Five Thousand Feet of Lumber* (D. C.) 26 Fed. 716.

[b] (U. S. 1888) A chartered vessel received on board less cargo than was called for by the bill of lading, through fraud or error of the consignor, but the master, before signing, inserted in the bill of lading, "Vessel not responsible for difference in weight," and she thereafter duly delivered her cargo, but, owing to the error in the bill, the draft being protested, and the transmission

of the bill being delayed, no consignee appeared to receive the cargo on arrival, and it was taken by the collector and sold for duties. *Held*, that the ship had made a "right delivery" of her cargo, and that the charterers, who were also the consignees, were liable for the agreed hire of the ship, notwithstanding that they had suffered loss through the error of the bill, by not having funds to meet the draft; such damage being too remote to be offset.—*McKay v. Ennis* (D. C.) 37 Fed. 229.

[c] (U. S. 1892) A charter provided that the vessel should be reported at the custom house by the charterers or their appointee, or pay £20 liquidated damages. The master reported to the charterers on the day of arrival, but the latter and their appointee declined to enter the ship unless they should be allowed to do the ship's inward business, which the ship refused. On libel filed by the shipowner to recover freight, charterers claimed to deduct the £20. *Held*, that the right to do the inward business of the ship could not be allowed the charterers unless plainly indicated in the charter, and that the phrase "to report at the custom house" did not include the handling of such inward business; hence the ship, in reporting to the charterers, had fulfilled her part of the charter, and the charterers could not be permitted to deduct the £20 from the freight.—*Mignano v. MacAndrews* (D. C.) 49 Fed. 376; *Callfano v. Same*, *Id.* Decree affirmed (1893) 53 Fed. 958, 4 C. C. A. 6.

[d] (U. S. 1893) A provision of a charter party that the vessel shall pay "for loading, compressing cotton, and insurance at presses," includes compressing elsewhere than at the port of loading, of which the ship receives the whole benefit, and for which the charterer has made allowance in the freights paid by shippers at rates less than that fixed by the charter party.—*Baxter v. Card* (D. C.) 59 Fed. 165.

[e] (U. S. 1894) A vessel chartered to carry forward part of the cargo of another from a port into which the latter had put in distress is entitled to her freight without deductions for advances made by the charterers of such other vessel secured by a bottomry note, which also assigned the freight to pay such advances.—*Berry v. Grace* (D. C.) 62 Fed. 607.

[f] (U. S. 1896) Where a shipper, acting also as agent for the charterers, disbursed the ship in a foreign port, his consignees were not entitled to deduct the amount of such disbursements from the freight, when the freight was sued for by the shipowners in enforcement of their lien for the charter hire.—*O'Connell v. One Thousand and Two Bales of Sisal Hemp* (D. C.) 75 Fed. 410.

[g] (U. S. 1906) In a dispute between a steamer owner and a charterer with respect to a deduction by the charterer of 1 per cent. from the prepaid freight, *held*, that under the terms of the contract the owner was entitled to full freight without deduction.—*Capuccio v. Barber & Co.* (D. C.) 148 Fed. 473.

[h] (U. S. 1907) Under a provision of a time charter requiring the owners to provide men to work the winches both day and night as required, the ship's duty is fulfilled by providing sober and competent winchmen from among the crew, and, where the charterers for their own convenience employ shore winchmen, the wages of such winchmen cannot be deducted from the charter hire.—*The Santana* (D. C.) 152 Fed. 516; *Clyde Commercial Steamships v. United States Shipping Co.*, *Id.*

II. FOR DAMAGE, LOSS, OR LIGHTERAGE OF CARGO.

[a] (U. S. 1902) The cost of lightering a vessel's cargo to the discharging berth designated by the assigns of the charterers under the charter party, which the vessel was prevented by an overhead bridge from reaching without cutting off or removing her steel masts, cannot be deducted from the freight, where the charter party required the vessel to discharge "always afloat" at a "safe port," or "so near the port of discharge as she may safely get," and provided that the anchorage directed must be the most convenient, and that if lighterage was necessary, either to reach the port or to deliver the cargo, the expense thereof was chargeable to the receivers of the goods, regardless of any local port custom. Decree (1901) 108 Fed. 89, 47 C. C. A. 222, reversed.—*Menneke v. A Cargo of Java Sugar*, 187 U. S. 248, 23 Sup. Ct. 86, 47 L. Ed. 163.

[b] (U. S. 1893) In making a contract for the transportation of a full cargo of sugar, the parties used a printed form containing this provision: "The freight to be paid on the unloading and right delivery of a cargo of sugar at and after the rate of nine shillings sterling per ton of twenty hundredweight delivered." The printed word "delivered" was struck out, and the words "on intake weight" were interlined in writing. *Held*, that the charterer was bound to pay freight on the whole cargo taken aboard, although part of it was damaged, without the ship's fault by an excepted peril, and sold on the voyage.—*One Thousand Bags of Sugar v. Harrison*, 53 Fed. 828, 4 C. C. A. 34, 3 U. S. App. 366, affirming *Harrison v. One Thousand Bags of Sugar* (C. C. 1891) 50 Fed. 116.

[c] (U. S. 1875) A stipulation in a charter party, "only half freight to be paid for all barrels delivered in a broken state," covers all barrels broken when delivered, though some were broken when shipped.—*Durkee v. Workman*, Fed. Cas. No. 4,194, affirming (1874) Fed. Cas. No. 4,195.

[d] (U. S. 1887) When a ship is, by her charter party, entitled to her whole freight, "upon a true delivery" of the cargo, and she delivers a portion in a damaged condition, she is entitled only to the specified freight, less the damages for the loss on the cargo.—*The Tangler* (D. C.) 32 Fed. 230.

[e] (U. S. 1892) On the question of whether the charterer of a vessel to carry a cargo of logwood from Jamaica to New York was entitled to a deduction of freight for 50 tons of wood cut by the stevedore of the vessel into lengths of less than three feet, for the purpose of filling up the vessel, the total cargo being only 436 tons, it was proven that in loading straight logwood in Jamaica it was not customary to cut any considerable quantity in lengths of less than three feet, because such cuttings injure the value of the cargo. *Held*, that the charterer was entitled to the deduction.—*Dickie v. Wilson* (D. C.) 49 Fed. 390.

[f] (U. S. 1893) Where the charterers of a foreign ship, being responsible to the owners for the charter hire, and having received freight upon goods delivered to the consignees, are liable to the latter for damage claims arising through negligence of the ship, and the owners are foreign, and have no assets in this country, the charterers will not be required by a court of admiralty to pay over to the owners the whole amount of the charter hire, except upon security indemnifying them against such reasonable and probable demands as may have arisen against the charterers through the fault of the owners in the transportation of the cargo.—*Milburn v. Nord-Deutscher Lloyd* (D. C.) 58 Fed. 603.

[g] (Mass. 1872) A charter party for the freighting and chartering of a ship to a port of discharge and back, at a lump sum for the round voyage, provided that "the amount of the outward freight" should be "paid the captain on the safe delivery of the outward cargo" at the port of discharge, "free of insurance and commissions, less towage and compressing," and that towage and compression should be paid by the charterers. Some of the cargo was so damaged on the outward voyage, by a peril of the sea, that it had to be sold in a port of distress; but the ship delivered the remainder safely, and made the round voyage. *Held*, that the whole freight was due.—*Leckie v. Sears*, 109 Mass. 424.

[h] (Mass. 1881) A part of the charter money was payable at the outward port, and the remainder on the return of the vessel and proper delivery of the cargo, and on the return voyage the captain placed in the part of the ship reserved for his use a certain package which the consignee had refused to receive, and which was broken into on the return voyage and part of its contents stolen, without negligence on the part of officers or crew; the same not being included in the bill of lading for the return cargo, and the latter having been properly delivered. *Held*, that the package formed no part of the return cargo, and that the charterer could not recoup the value of the missing goods.—*Mayo v. Preston*, 131 Mass. 304.

[i] (N. Y. 1886) The obligation of the charterer to pay a lump sum agreed upon is not lessened by the loss, not shown to be the fault of any one, except, possibly, thieves, of an insignificant portion of the cargo, 100 boxes of lemons, for instance.—*Roberts v. Societa Anonima*, 53 N. Y. Super. Ct. (21 Jones & S.) 424.

III. FOR UNFITNESS OR UNSEAWORTHINESS OF VESSEL, DETENTIONS, OR DELAYS.

[a] (U. S. 1870) A deduction from the monthly hire of a vessel will be made, where the voyage has been protracted by reason of the insufficiency of the sails, etc.—*Haggett v. Bowman*, Fed. Cas. No. 5,900 [1 Sawy. 4].

[b] (U. S. 1888) A vessel chartered to the Mediterranean and back to New York, put into her home port in Italy on account of stress of weather. Some repairs were put on her there, and she was detained three weeks longer, through acute rheumatism of the master. *Held*, that the owner was not justified in detaining the vessel in her home port for such reason without indemnifying the charterer for the delay.—*The Giulio* (D. C.) 34 Fed. 909.

[c] (U. S. 1889) The steamship *D.* delivered a cargo of grain which she had been specially chartered to transport, and part of which was damaged through contact with an iron bulkhead between the cargo and the engine room. The evidence showed that the construction of the ship was not unusual at Copenhagen; that the grain was stowed in accordance with the custom of Copenhagen, where this cargo was loaded; and that a practice of sheathing the iron bulkhead with wood, the lack of which in this case was the negligence complained of, is not in use in Denmark, and only to a limited extent in New York. *Held*, that the vessel was liable only for negligence, under the circumstances of her employment, and that no negligence was proved, the shippers apparently acquiescing in the stowage; but, on the meager evidence as to usage at Copenhagen, the libellant for damage to cargo was allowed to discontinue without prejudice, and the vessel was held entitled to her freight in full.—*The Dan* (D. C.) 40 Fed. 691.

[d] (U. S. 1903) Under a charter party providing that if the yacht meets with an accident, and in consequence is laid up for repairs for a period exceeding seven days, there shall be a rebate from the charter money for the number of days it is so laid up for repairs, the rebate is not for the time in excess of seven days, but for the whole period it is laid up.—*Dahlgren v. Whitaker* (D. C.) 124 Fed. 695.

[e] (U. S. 1904) A steamship was chartered for a voyage and return at a stipulated hire per month. The charter required her to be tight, staunch, and strong, and in every way fitted for the service. It also contained a provision that in the event of loss of time from "breakdown of machinery, stranding, fire, or damage preventing the working of the vessel for more than twenty-four running hours the payment of the hire shall cease until she be again in an efficient state to resume her service." On the return voyage the ship stranded, and was several days on the rocks, receiving such injury to her hull that two of her holds containing cargo were partly filled with water, and remained so through the remainder of the voyage, which was completed only by the use of extra pumps, which were procured at a port to which she deviated after the accident. *Held* that, the vessel not having been in an efficient state after the stranding, no charter hire could be recovered after that time, except for the time taken in discharging.—*Lake Steam Shipping Co. v. Bacon* (D. C.) 129 Fed. 819.

[f] (U. S. 1907) In an action to recover the balance due on a charter party, evidence *held* insufficient to show that an injury to the yacht was caused by a defect in her outfit, within a provision in the charter party that, in case she should become unfit for use for a period of more than 48 hours because of any defect in her outfit, there should be a pro rata return of the charter money to the hirer.—*Hills v. Leeds* (D. C.) 149 Fed. 878.

[g] (U. S. 1907) Where a time charter of a steamer required her to be in every way fitted for the service and to have steam winches, which were to be at the charterer's disposal, the charterer is entitled to an allowance for delay in discharging due to the defective condition of the winches or deficiency in steam power for operating them.—*Munson S. S. Line v. Miramar S. S. Co.* (D. C.) 150 Fed. 437.

[h] (Mass. 1860) Under a charter party in which the owner agrees that the vessel shall be kept tight, staunch, well-fitted, and tackled for a voyage, the charterer takes on himself the risk of such delay as is necessary to enable the owner to perform his contract of keeping the vessel seaworthy during the voy-

age, and cannot subject the owner to any loss or damage resulting from the retardation occasioned by putting into port for repairs.—*Cook v. Gowan*, 81 Mass. (15 Gray) 237.

[i] (N. Y. 1879) In an action for freight and demurrage against the assignees of the bill of lading of a cargo of sugar, who were in fact the agents of the owner and consignor of the cargo, the defendants were entitled to recoup damages accruing from the master's violation of revenue laws, whereby the cargo was seized by the Cuban authorities, and during the detention there was a loss by drainage and waste.—*Elwell v. Skiddy*, 77 N. Y. 282.

[j] (N. Y. 1879) A charterer of a steamship agreed that the cargo "be received and delivered within reach of the vessel's tackles at ports of loading and discharging," and to pay "for the use of said vessel during the voyage" \$7,000 and all expenses, save in case of accident, "including victualing and manning." The charter party contained no declaration of demise, or that the charterer was to take the vessel into his possession, or man, equip, furnish or control her. Through the negligence of the engineer, the boiler gave way, causing delay. *Held*, in an action by the owners to recover a balance of the \$7,000, with expenses and demurrage, that the charter party was simply a contract of affreightment, and the defendant could counterclaim for the damages resulting from the engineer's negligence.—*Hagar v. Clark*, 78 N. Y. 45, reversing (1878) 12 Hun, 524.

IV. FOR DEFICIENCY OF TONNAGE OF VESSEL OR SHORTAGE OF CARGO.

[a] (U. S. 1868) Where a charter party provides for a voyage from New York to a foreign port and back to New York, and the vessel delivers the outward cargo at the foreign port, which is received by the charterer's agent, the freight being paid by him, and the vessel receives on board a part of the return cargo, but by fault of the vessel the whole cargo is not received, and she returns to New York with part of the cargo, she may recover upon her arrival at New York for the portion actually delivered; and the charterer is entitled to recoup against it any damages set up in the answer which arose out of any breach of the charter party by the owners of the vessel, to the amount of such freight, but for any claim beyond that he must resort to his own proper action.—*Holyoke v. Depew*, Fed. Cas. No. 6,652 [2 Ben. 334].

[b] (U. S. 1880) A vessel guaranteed to have a capacity of 1,250 tons was chartered to carry a cargo of petroleum, etc., to Leghorn, and to bring home marble in blocks, "the latter, if any shipped, not to be more than 600 tons," with sufficient rags for dunnage. The vessel proved to have a capacity of only 1,085 tons, and an allowance was made upon the sum paid for the outward voyage. On the return voyage the charterer furnished only a cargo of 600 tons of marble and 120 tons of light cargo. *Held*, that as the stipulated return cargo was only 600 tons of marble, no allowance could be claimed by the charterer for the deficiency in the vessel's tonnage, and that this provision as to the size of the return cargo could not be overcome by proof that vessels loaded with marble always carried light cargo also, and that the quantity of marble was named because insurers objected to vessels carrying more than three-fourths of the cargo in marble.—*Ruger v. Reck* (C. C.) 5 Fed. 131.

[c] (U. S. 1891) A printed charter party gave the charterers a right to put on board a full cargo of cotton, or any lawful merchandise, using all spaces where cargo was usually carried, and the owners guaranteed first-class insurance. On the margin of the instrument was written a clause giving the charterers a right to ship cattle on the deck. *Held*, that the charterers could not recover freight for cattle which they would have shipped, but did not because insurance was not obtainable; it appearing that insurance was refused for reasons not calling in question the vessel's seaworthiness, and that shippers did not usually construe the guaranty of insurance as covering deck cargo, especially cattle, unless expressly so provided.—*Myers v. The Unionist* (D. C.) 48 Fed. 315.

[d] (U. S. 1906) A steamship was operated by a charterer for two or three years under a time charter and renewals thereof; the hire being paid at the end of each trip at a fixed rate per month on her registered tonnage. From time to time the charterer objected that she was not loaded to her full ca-

capacity by the master, but the charter hire was paid for such trips with knowledge of the amount of cargo she actually carried. *Held*, that any claim of the charterer on account of such shortage on such trips was foreclosed by such settlements, but that in a suit for charter hire for the concluding voyages which had not been paid, he was entitled to a deduction for the shortage of cargo carried on such voyages below her represented and actual capacity.—*Vacarrezza v. 567,000 Gallons of Molasses* (D. C.) 149 Fed. 792.

[e] (N. Y. 1840) Where a party contracts to load a ship at a stipulated price per ton, and fails to ship the whole number of tons, he is liable for the deficiency; but, where goods are offered by a third person to make up the deficiency at reduced prices, which are current prices, the master of the vessel must receive them and credit the original charterer with their earnings.—*Heckscher v. McCrea*, 24 Wend. 304.

(156 Fed. 361.)

PUGET SOUND NAVIGATION CO. v. LAVENDAR et al.

(Circuit Court of Appeals, Ninth Circuit. October 14, 1907.)

No. 1,425.

1. COURTS—FEDERAL COURTS—DETERMINATION OF QUESTIONS OF JURISDICTION.

A Circuit Court of Appeals is bound to inquire, first, as to its own jurisdiction of a cause brought before it by appeal or writ of error, and, second, as to the jurisdiction of the court from which the record comes, even though the question is not raised by the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1103.

Jurisdiction of Circuit Court of Appeals, in general, see notes to *Lau Ow Bew v. United States*, 1 C. C. A. 6; *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 475.]

2. APPEAL AND ERROR—REVERSAL FOR JURISDICTIONAL DEFECTS—DISPOSITION OF CAUSE.

Where a Circuit Court was without jurisdiction of a cause because of the absence from the complaint of necessary jurisdictional allegations, the appellate court, in reversing the judgment therein for that reason, may properly remand the cause and direct that plaintiff be permitted to amend the complaint in that respect, especially where the question of jurisdiction was not raised in the trial court.

In Error to the Circuit Court of the United States for the Northern Division of the Western District of Washington.

Ira Bronson and D. B. Trefethen, for plaintiff in error.

Byers & Byers (Clay Allen, of counsel), for defendants in error.

Before GILBERT, Circuit Judge, and DE HAVEN and HUNT, District Judges.

GILBERT, Circuit Judge. Mary R. Lavendar, as plaintiff, brought this action to recover damages against the plaintiff in error and Charles Stanley and Samuel Barlo, as defendants. The complaint shows no jurisdiction on the ground of diversity of citizenship. It alleges the citizenship of the plaintiff in error, but makes no allegation whatever as to the citizenship of the other parties to the action. No other ground of jurisdiction is suggested. This court is bound to inquire, first, as to

its own jurisdiction, and, second, as to the jurisdiction of the court from which the record comes, and this even when the question is not raised by the parties to the action. *M. C. & L. M. Ry. Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462.

The judgment must therefore be reversed for want of jurisdiction in the Circuit Court.

But, while reversing the judgment, this court may properly direct that the plaintiff in the action be permitted to amend the complaint so as to show diverse citizenship. *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057; *Morgan v. Gay*, 19 Wall. 82, 22 L. Ed. 100; *Johnson v. Christian*, 125 U. S. 645, 8 Sup. Ct. 1135, 31 L. Ed. 820; *Stuart v. City of Easton*, 156 U. S. 46, 15 Sup. Ct. 268, 39 L. Ed. 341; *Rondot v. Township of Rogers*, 79 Fed. 677, 25 C. C. A. 145.

In *Robertson v. Cease*, it is said:

"Such a course is peculiarly proper in this case in view of the failure of the plaintiff in error to make in the court below the precise question of jurisdiction which he urges upon our consideration."

In *Rondot v. Township of Rogers*, Judge Taft said:

"It is doubtless true that the plaintiff in error can amend his declaration so as affirmatively to show his alienage, and thus that the same questions will probably be presented on a new trial as now arise upon the record. It would shorten the litigation, therefore, were we now to pass upon the questions raised, but the Supreme Court has not deemed it proper to take such a course in a case like this. *Robertson v. Cease*, 97 U. S. 647, 24 L. Ed. 1057."

The judgment of the Circuit Court is reversed, with costs to the plaintiff in error, and the cause is remanded to the Circuit Court, with leave to apply for amendment, and for further proceedings.

(156 Fed. 362.)

**INTERNATIONAL POSTAL SUPPLY CO. OF NEW YORK v. AMERICAN
POSTAL MACHINES CO.**

(Circuit Court of Appeals, First Circuit. October 9, 1907.)

No. 664.

1. PATENTS—INFRINGEMENT—STAMP CANCELING MACHINES.

The Laass and Hey patent, No. 388,366, and the Hey patent, No. 632,527, for stamp canceling machines of the type in which the letter actuates the printing mechanism, construed, and *held* not infringed.

2. SAME.

Bates v. Keith, 84 Fed. 1014, 28 C. C. A. 638, as to implements of universal use, applied, and decision of the Circuit Court of Appeals for the Second Circuit in *Groth v. International Postal Co.*, 61 Fed. 284, 288, 9 C. C. A. 507, followed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

For opinion below, see 141 Fed. 969.

Arthur E. Parsons and Benjamin Phillips (Alfred H. Hildreth, on the brief), for appellant.

William K. Richardson (Alexander D. Salinger, on the brief), for appellee.

Before PUTNAM, Circuit Judge, and ALDRICH and BROWN, District Judges.

PUTNAM, Circuit Judge. This is a bill in equity for the alleged infringement of three patents, as follows: The first, issued on May 4, 1886, to George W. Hey and Emil Laass, on an application filed February 26, 1884, No. 341,380; the second, issued on August 21, 1888, to George W. Hey and Emil Laass on an application filed on June 2, 1884, No. 388,366; the third, issued on September 5, 1899, to George W. Hey, on an application filed on September 17, 1884, No. 632,527. The Circuit Court dismissed the bill, and the plaintiff appealed to us, limiting its appeal to the second and third patents, namely, No. 388,366 and No. 632,527.

The specification of the first patent states that it is for "improvement in marking and stamping apparatus," and that the object of the invention was to mark or stamp mail matter and analogous articles in an expeditious manner, and that, to this end, the invention consisted of novel means for automatically applying the stamp. There were 18 claims in all. The only one we need now notice is the following:

"4. In combination with a letter-supporting bed, a carrier for moving the letter over the bed, a stamp or marker, and a mechanical engaging-finger to engage the moving letter and transmit motion to the stamp or marker, substantially as described."

The application for the second patent—that is, No. 388,366—contains the following:

"Our invention relates to improvements in stamping apparatus of the character set forth and fully described in our application for letters patent filed February 26, 1884, patented May 4, 1886, No. 341,380; and it has for its object the production of an apparatus with which letters and mail-matter generally may be automatically stamped while the said letters or mail-matter are in transit on a letter-supporting bed, over which the aforesaid mail-matter is moved; and the invention consists, essentially, in the combination, with the letter-supporting feed-bed, of a stamp normally out of the path of movement of the mail-matter and a stamp tripper or releaser normally in said path."

The application then proceeds to state some further details to which the patent relates. At the close the following appears:

"We do not claim, broadly, the combination with a letter-supporting feed-bed, of a movably-supported marking-roller, held intermittently in the letter-path; neither do we claim, broadly, the combination, with a letter-feed, of a marking-roller and a contact-finger connected to operate the marking-roller without stopping the letter to control the registry of the marking die thereon, the same forming the subject-matter of a separate pending application in favor of George W. Hey."

It is apparent that these extracts from the application for patent No. 388,366 were not completed when the application was filed, because the first one refers to a subsequent date of May 4, 1886. The second one is confused, but, probably, it refers not only to the application for patent No. 341,380, but, also, to the application for patent No. 632,527, which was filed between the time the application for patent No. 388,366 was filed and the time of its issuance. These topics, however, will not prove of consequence.

Patent No. 388,366 contains five claims, of which the only ones we need notice are as follows:

"1. In a machine for stamping or marking mail-matter, the combination, with the supporting-feed bed, of a stamp normally out of the path of move-

ment of the mail-matter, and a stamp tripper or releaser normally in said path.

"2. In a machine for marking mail-matter, the combination of an oscillating frame carrying a marking-roller, and a lever provided with a catch for engaging the oscillating frame and extending into the path of the moving mail-matter."

The specification of the third patent states that it relates to machines for automatic stamp-canceling, and that such machines had not been successful in practical operation for lack of proper registration. The specification is very long, covering many details to which apparently the patent relates; and there are 69 claims. We need repeat only claim 4:

"4. In a mail-marking machine for automatically marking mail-matter, the combination with a feed member and a marking member having a die; of means for controlling the registration of the die upon the mail-matter."

The underlying feature of all these three patents is that, in some manner, the series of mechanical events which results in stamping the letter is set in motion by contact with the letter itself. It seems to be admitted that the patent which first issued, No. 341,380, was the first in the art in which this important feature was developed. Notwithstanding all that is said to the contrary, we cannot deny that, looking at this feature broadly, it is an essential element in the respondent's machine. If, therefore, we had to deal with any patent belonging to the complainant in which the claims covered this broad feature, we might be compelled to doubt the conclusion reached by the Circuit Court; but, as the case stands, and as we are not dealing with the first patent to Laass and Hey, we must affirm it.

The record here is very voluminous, containing over 3,000 pages. The opinion of the learned judge of the Circuit Court was evidently elaborated with great care. It fully explains all the facts necessary for an understanding of the case as it appears before us. The questions involved are such that, probably, no future case will present the same conditions, so that it would be of no benefit to either the bench or the profession to extend this opinion by restating generally what has been already fully set out.

The complainant contends that the first claim of the second patent, No. 388,366, is so broad that it covers "every kind of a stamp normally out of the path of the moving mail-matter, and every kind of a tripper or releaser for the stamp normally in said path." It necessarily rests its case on this proposition. The opinion of the learned judge of the Circuit Court has met this fully in detail, and we need not go so much into it as he has done. It is enough for us to say that the first patent to Laass and Hey, which, as we have said, is not now in issue, exhibited one method by which stamping a letter is accomplished by a stamp "normally out of the path of movement of the mail-matter," made effective by the result of a contact between the letter and something normally in its path; so that what appears in patent No. 388,366, if invention at all, is simply for an improvement on what was described by the earlier one.

Claim 1 of patent No. 388,366 substituted as a connecting link between the letter and the stamp or die a series of mechanical devices in lieu of an electric current shown in patent No. 341,380. In the

state of the art as it now exists, and as it existed when these patents were applied for, the making of such a substitution was *prima facie* within the rules as to equivalents. If the respondent is correct in stating its position, the direction of activity was reversed between the machines of the earlier and the later patents; but this, also, in the state of the art, was *prima facie* within the rules as to equivalents. There are no other differences. Therefore it is clear that claim 1 of the second patent must have been purely for improvements in details, as stated in what we have quoted from the specification; and, as the learned judge of the Circuit Court has well said, in substance, claim 2 of the second patent is more clearly subject to the same observation. The details in the respondent's machine vary from patent No. 388,366 at least as widely as No. 388,366 varies from the one which preceded it. This, also, was the substantial conclusion of the Circuit Court of Appeals for the Second Circuit in *Groth v. International Postal Supply Co.*, 61 Fed. 284, 288, 9 C. C. A. 507; so that, not only because our own investigations lead to the same result as that reached by the Circuit Court, but to one in harmony with an earlier decision of the Circuit Court of Appeals for another circuit, we hold that the appeal, so far as patent No. 388,366 is concerned, cannot avail.

Coming to patent No. 632,527, which we have said relates so far as we are concerned to registration, the learned judge of the Circuit Court observed, in effect, that it was impossible that the respondent's device assimilated with the complainant's, because in the complainant's machine we start with a die normally at rest, while in the respondent's we start with a die which is always rotating. Therefore the problem of the complainant's machine must be solved by controlling the die, while that of the respondent's must be solved by controlling the feed. We may also add that, in the state of the art, registration is a matter of such universal use and application that mechanism providing therefor is usually matter of detail. As with guides, moulding tools, and other implements of universal use, every mechanic enjoys the public right to organize methods of registration to meet the peculiarities of his own mechanism. *Bates v. Keith* (C. C.) 82 Fed. 100, 103; *Id.*, 84 Fed. 1014, 28 C. C. A. 638. Consequently, as we approve the distinctions made by the learned judge of the Circuit Court, we must accept his conclusion as correct; and thus the appeal is entirely disposed of.

The judgment of the Circuit Court is affirmed, and the appellee recovers its costs of appeal.

(156 Fed. 359.)

GRAND TRUNK RY. CO. OF CANADA v. FLAGG.

(Circuit Court of Appeals, First Circuit. October 24, 1907.)

No. 735.

1. RAILROADS—ACTION FOR INJURY TO PERSON ON TRACK—PROOF OF SUFFERING.

A child five years old was struck by a railroad engine, so as to break in his skull, exposing and crushing parts of the brain. He breathed for three-quarters of an hour after, and at times moaned. *Held*, that in a common-law action by his administrator to recover damages for his

suffering resulting from his injury, which right of action survived to plaintiff by statute, evidence of such facts was insufficient to show that the child in fact suffered or to authorize a recovery.

2. SAME—INJURY TO TRESPASSER—EVIDENCE OF WANTON NEGLIGENCE.

A railroad company owes no duty of care to a trespasser on its track, except to refrain from his willful or wanton injury, and cannot be held liable for the injury of a child so trespassing, where the engineer of the train which struck him testified that he came upon the track so short a distance ahead of the engine that it was impossible to stop the train before striking him, and where the engineer's testimony was uncontradicted, except by evidence which at most could no more than raise a probability that the child had walked for some distance on the track.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1238, 1239, 1359–1361.]

In Error to the Circuit Court of the United States for the District of Maine.

Leroy L. Hight (Clarence A. Hight, on the brief), for plaintiff in error.

Henry W. Oakes (Oakes, Pulsifer & Ludden, on the brief), for defendant in error.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

LOWELL, Circuit Judge. Ernest Flagg, the plaintiff's intestate, a child five years old, was struck by the defendant's engine, and died, as will hereinafter be set out more fully. In so far as the suffering caused him by the injury complained of gave a right of action to the child in his lifetime, this action survived to the plaintiff, by virtue of the statutes of Maine, and the plaintiff thereupon sued the defendant at law, and recovered judgment upon the verdict of a jury. At the trial the defendant seasonably moved the Circuit Court to direct a verdict in its favor, and it duly excepted to the court's refusal. The motion was urged upon two grounds, which sufficiently appear from the record as a whole.

1. That there was no evidence of the child's suffering. The action was based upon a right recognized by the common law, apart from statute. The plaintiff's right, thus sued on, gave him damages only for the suffering of his intestate, not for his intestate's death. If the child did not suffer, his administrator cannot recover in this action. The defendant's engine struck the child's forehead, so as to break in the skull and to force back the top of it, exposing and crushing parts of the brain. The child breathed for three-quarters of an hour. As evidence of his suffering during this time, the plaintiff relied upon his moans, the motions of his lips, and certain sounds which his father took to be the words "Papa" and "Mamma." The child was congenitally deaf, and therefore almost dumb. Momentary consciousness of suffering, incidental to death, and at law inseparable from it, may not be excluded by this evidence; but we hold that the plaintiff offered no proof of that suffering, for which alone the law in its practical administration can award damages. *The Corsair*, 145 U. S. 335, 348, 12 Sup. Ct. 949, 36 L. Ed. 727. It follows that the learned judge below erred in refusing to direct a verdict for the defendant.

2. As additional evidence of the child's suffering may be introduced at the next trial, we are obliged to examine also the other ground upon which the defendant rested its motion for a verdict. It contended that there was no evidence of the negligence of its engineer, the defendant's servant alleged to be in fault. When struck, the child was a trespasser upon the railroad track. As to him, the engineer was required only to refrain from willful or wanton injury. The engineer testified that the child sprang upon the track when the train was but 15 or 20 rods away. To stop the train within that distance was impossible. There was evidence that the child was seen walking down the track just before the engine struck him. The plaintiff contended that the jury might infer the child's longer presence on the track from the fact that the private way, by which the child probably entered the railroad location, crossed it 78 feet from the place of the accident, and so that the child had probably walked along the track for that distance. As the track was straight, and the view unobstructed, the plaintiff further contended that the engineer must have seen him for some time before the accident, and therefore must have run over him recklessly. But to rely upon these mere probabilities is to disregard direct evidence for conjecture. The probabilities are too slight to warrant a verdict for the plaintiff. The circumstances of the case are too little known. There is no evidence in the record to show that the engineer saw the child while it was possible to stop the train. Unless he did, the defendant corporation was not at fault toward a trespasser. On this ground, also, the jury should have been directed to return a verdict for the defendant.

The judgment of the Circuit Court is reversed, and the case is remanded to that court, with directions to set aside the verdict and for further proceedings not inconsistent with this opinion; and the plaintiff in error recovers its costs of appeal.

(156 Fed. 455.)

SAN JOSE-LOS GATOS INTERURBAN RY. CO. v. SAN JOSE RY. CO.

(Circuit Court of Appeals, Ninth Circuit. October 14, 1907.)

No. 1,446.

1. COURTS—FEDERAL COURTS—CONSTRUCTION OF STATE STATUTES.

The construction of a statute of a state by its highest court will be followed by the federal courts; but, where such highest court is composed of a number of judges, a construction placed upon a statute by the opinion of one judge which is not concurred in by a majority is not so binding, but leaves the question to be determined independently by a federal court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13. Courts, § 957.

State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

2. MUNICIPAL CORPORATIONS—GRANT OF STREET RAILROAD FRANCHISE—CALIFORNIA STATUTE.

Civ. Code Cal. § 499, provides that "two lines of street railway, operated under different managements, may be permitted to use the same street, each paying an equal portion for the construction of the tracks and appurtenances used by said railways jointly; but in no case must two lines of street railway, operated under different managements, occupy and use the same street or tracks for a distance of more than five blocks consecutively." *Held*, that such provision does not deprive the municipal

authorities of a city of power to grant to two railways, having tracks of different width, the right to operate their cars on the same street for a distance not exceeding five blocks, each occupying the middle of the street, and each paying an equal portion of the cost of paving between and beside the tracks as required by section 498.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1465.]

Appeal from the Circuit Court of the United States for the Northern District of California.

Louis Oneal and Owen D. Richardson, for appellant.

Goodfellow & Eells and S. F. Leib, for appellee.

Before GILBERT, Circuit Judge, and DE HAVEN and HUNT, District Judges.

DE HAVEN, District Judge. This is a suit in equity to obtain a decree enjoining the defendant from constructing a street railroad upon a portion of San Fernando street, in the city of San Jose. The Circuit Court granted an injunction pendente lite; and from this order the defendant appeals. The plaintiff was at the date of the commencement of the action operating a single track narrow-gage electric street railroad within the city of San Jose, under a franchise granted in the year 1891, and expiring in the year 1936. The track of plaintiff's road is in the center of the street, and the distance between the rails is three feet. Defendant on March 6, 1905, obtained from the municipal authorities of the city of San Jose a franchise to construct and operate a single track broad-gage electric railroad along certain streets of that city, including two blocks of San Fernando street, occupied by plaintiff's road. The bill of complaint alleges that, by the terms of the franchise under which defendant proposes to construct and operate its railroad, the tracks of such railroad are "required to be as nearly as possible in the middle of the street, and the defendant is now proceeding to lay and construct the same in accordance therewith; the distance between defendant's rails being four (4) feet, eight and one-half (8½) inches; the same being parallel with your orator's rails; each of the defendant's rails being outside of or further from the center of the street than each of your orator's rails." The bill then alleges that the operation by defendant of its cars will interfere with and prevent in a great measure, the operation by plaintiff of its railroad and cars, and will deprive it of the rights and privileges to which it is entitled by its franchise.

There is only one question presented by this appeal, and that relates to the validity of defendant's franchise; plaintiff contending, in support of the order appealed from, that under section 499 of the Civil Code of California the city of San Jose was without authority to grant the right to construct and maintain a broad-gage railroad along that portion of San Fernando street already occupied by the plaintiff's narrow-gage railroad under its prior franchise, and that by reason of this want of power in the city the franchise under which defendant seeks to construct its road is void. The section of the Civil Code referred to is as follows:

"Sec. 499. Two lines of street railway, operated under different managements, may be permitted to use the same street, each paying an equal portion for the construction of the tracks and appurtenances used by said railways jointly; but in no case must two lines of street railway, operated under different managements, occupy and use the same street or tracks for a distance of more than five blocks consecutively."

The allegations of the bill of complaint show that defendant by its franchise is given the right to lay the rails of its road parallel with those of plaintiff's road, and, by reason of the greater width of defendant's road, it will when constructed occupy the same portion of the street now occupied by plaintiff's road and an additional space of 10.25 inches on each side of it.

The contention of the plaintiff is that under the section of the Civil Code of California, just quoted, the municipal authorities of a city or town cannot grant to two lines of street railway, operated under different managements, the right to use any portion of the same street, except upon condition that both of them use the same track and rails, and where, as in the case here, the road operating under the prior franchise is of narrow-gage construction, the city is without authority to permit a broad-gage railroad to be constructed along any portion of the same street, because the cars of the two roads could not be operated upon the same rails, and *Omnibus R. R. Co. v. Baldwin*, 57 Cal. 160, is cited as a controlling authority in support of plaintiff's position. The principal opinion in that case was delivered by Mr. Justice Sharpstein, and, speaking of section 499 of the Civil Code of California, which, so far as relates to the present question, was substantially the same then as above quoted, he said:

"The first clause of this section clearly means that a right to use the same street cannot be granted to more than two corporations in any case, and, if granted to two, it must be upon the condition that both use the same track, and that each pay an equal portion of the cost of constructing it."

This language certainly supports the contention of plaintiff, but it was not concurred in by a majority of the court. The court was then composed of seven members, and all of them participated in the decision of that case, and it appears from the case as reported that only two judges concurred in the view thus expressed by Mr. Justice Sharpstein, and another, while concurring specially in the judgment upon a particular ground stated by him, added:

"I do not, however, concur in full in the construction, placed by my associates upon section 499 of the Civil Code."

The remaining three judges dissented from the judgment, without expressing any opinion whatever as to the proper construction of the section referred to.

It is well settled that the construction of a statute of the state by its highest court will be followed by the federal courts. *Olcott v. Supervisors Fond du Lac County*, 16 Wall. 678, 689, 21 L. Ed. 382; *Fairfield v. County of Gallatin*, 100 U. S. 47, 25 L. Ed. 544; *Louisville, etc., Railway Co. v. Mississippi*, 133 U. S. 587, 591, 10 Sup. Ct. 348, 33 L. Ed. 784; *McElvaine v. Brush*, 142 U. S. 155, 160, 12 Sup. Ct. 156, 35 L. Ed. 971. But we do not think, in view of the fact that the opinion of Mr. Justice Sharpstein, above quoted, was not concur-

red in by a majority of the court, that *Omnibus R. R. Co. v. Baldwin*, 57 Cal. 160, can be considered as having settled the construction of section 499 of the Civil Code of California, in accordance with the contention of plaintiff; and, as the question does not seem to have been passed upon by the Supreme Court of the state in any other case, we must be governed by our own interpretation of the statute, and in our opinion the most reasonable construction of the section under consideration is that it, in effect, declares that two lines of street railway, operated under different managements, may be permitted by the municipal authorities to use the same street (for a distance of not more than five consecutive blocks), each paying an equal portion for the construction of such tracks and appurtenances as are used by them jointly. The main purpose of the section is to protect the public from the inconvenience which would result if more than two railways under different managements were permitted to use the same street, or if two railways under different managements were permitted to use the same street for a distance of more than five consecutive blocks, and, as the city or town is authorized to grant to two independent railways the right to use the same street to the extent named, provision is made for an equitable distribution of the cost of constructing such tracks and appurtenances, as are used by them jointly. Section 498 of the Civil Code of California provides that, in granting the right of way to street railway corporations, the city or town authorities must require from them a strict compliance with the following conditions:

"(1) To construct their tracks on those portions of streets designated in the ordinance granting the right, which must be, as nearly as possible, in the middle thereof.

"(2) To plank, pave, or macadamize the entire length of the street, used by their track, between the rails, and for two feet on each side thereof, and between the tracks, if there be more than one, and to keep the same constantly in repair, flush with the street, and with good crossings.

"(3) That the tracks must not be more than five feet wide within the rails, and must have a space between them sufficient to allow the cars to pass each other freely."

It will thus be seen that when the right to lay rails in a street is given to two roads, both narrow or both standard broad gage, they must from necessity occupy precisely the same part of the street, and consequently use the same track and rails, and in that case each must pay an equal portion of the cost of constructing the tracks and appurtenances used by them jointly, as provided in section 499. So, also, when one is a narrow and the other broad gage, both must from necessity make a joint use of the portion of the street occupied by the road having the narrower width, and, by the terms of the same section, the cost of constructing that portion of the roadbed occupied by both must be borne by each jointly, but the clause requiring each of the roads to pay "an equal portion for the construction of the tracks and appurtenances used by said railways jointly" was not intended to deprive the municipal authorities of the power to grant to two railways having tracks of different width the right to operate their cars upon the same street. This provision of the statute does not concern the public, but defines the rights and obligations of the railroad companies, in the matter of which it speaks.

It is not claimed that the operation of defendant's broad-gage road in the manner proposed by it would inconvenience the plaintiff's road to any greater extent than would a narrow-gage road operating its cars on plaintiff's track, but it is said that narrow and broad gage rail-ways running over the same street would, by reason of the additional rails required for their use, obstruct the use of the street for other purposes than those of railway traffic, but the inconvenience to the public from this cause would not be great where the rails are laid flush with the surface of the street, as the law requires; and, were it otherwise, the fact would not justify the court in reading into the statute a provision not found therein, denying to municipal authorities the power to grant to such differently constructed roads the right to use the same street for a distance of not more than five consecutive blocks.

The order is reversed.

(156 Fed. 450.)

COLUMBIA BOX & LUMBER CO. v. DROWN.

(Circuit Court of Appeals, Ninth Circuit. October 14, 1907.)

No. 1,428.

1. NEGLIGENCE—DANGEROUS MACHINERY—ACTION FOR INJURY.

Plaintiff was working for a contractor who was installing a sprinkler system in defendant's mill, and while he was making a pipe connection, standing with one foot on a ladder and the other against a post, astride a revolving shaft, his clothing was caught by a set screw which projected from a safety collar on the shaft, and he was thrown to the floor and injured. It was shown that, by erecting a platform on which to stand, plaintiff could have done the work in safety, and also that the shaft would have been stopped if required. There was also testimony that the purpose of the safety collar was to protect a person working near from coming in contact with the set screw, and that, if the latter was properly adjusted to the collar, there was no danger from it; also that, while plaintiff saw the collar and knew that it contained a set screw, he did not know that the latter projected. *Held*, that upon such evidence the questions of defendant's negligence, plaintiff's contributory negligence, and his assumption of the risk were all properly submitted to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 279.]

2. SAME—WHEN QUESTION FOR JURY.

Where reasonable men might draw different conclusions from the undisputed evidence, the question of negligence or contributory negligence is one of fact for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 290, 291, 295.]

3. APPEAL AND ERROR—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error in permitting a witness to state a conclusion is without prejudice where he had previously stated the facts on which it was based.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4162.]

In Error to the Circuit Court of the United States for the Western Division of the Western District of Washington.

John T. Welch, Martin C. Welch, and Frank H. Kelley, for plaintiff in error.

Boyle & Warburton, Richard W. Ruffin, and E. B. Brockway, for defendant in error.

Before GILBERT, Circuit Judge, and DE HAVEN and HUNT, District Judges.

DE HAVEN, District Judge. This action was brought by the plaintiff to recover damages alleged to have been sustained by him while working in a mill operated by the defendant. The complaint alleges that plaintiff was in the mill by invitation of the defendant, in the performance of certain work which defendant was having done, and that the place where plaintiff was working was unsafe and dangerous by reason of a set screw which projected from a safety collar upon a revolving shaft. The answer denies that the place where plaintiff worked was rendered unsafe or dangerous by reason of the set screw referred to in the complaint, and alleges, first, that plaintiff was injured by reason of his own carelessness, and, as a further defense, that he knew of the location and character of the set screw, and could have chosen a place to do his work where he would not have been in any danger of coming in contact with it, and that, with full knowledge and appreciation of the danger incident thereto, the plaintiff assumed the risk of working in the place where he was injured. When the evidence was closed, the defendant moved the court to direct the jury to find a verdict in its favor. The motion was denied, and the case submitted to the jury, which returned a verdict for the plaintiff for \$3,500, and judgment was thereupon rendered in his favor for that sum. The case is brought here by the defendant upon writ of error.

It appears from the evidence that, at the time the injury was received by plaintiff, he was working for one Wellington, who was installing a sprinkler system in the defendant's mill, as an independent contractor. The plaintiff had had experience in installing similar plants in mills, and knew the ordinary dangers attendant upon working near machinery while in motion; and had been engaged in this work in defendant's mill for two months prior to the accident. The mill was in operation, and the plaintiff was in the act of changing a riser pipe which ran through the second floor of the mill. This pipe was to connect at right angles with the main line of pipe, and 7½ feet above the lower floor there was a shaft which served to operate a waste conveyor, which could have been stopped without interfering materially with the operation of the mill. While engaged in changing the riser pipe, the plaintiff came in contact with a set screw which projected from one-fourth to five-eighths of an inch from the safety collar on the shaft just referred to. The plaintiff had observed the safety collar, and knew that it contained a set screw, but did not know that it projected from the safety collar, and the plaintiff testified that the purpose of a safety collar is to protect a person while working near a set screw from coming in contact with it, and that, when the set screw is properly adjusted to a safety collar, there is no danger in working close to it. In attempting to put the riser pipe in position,

plaintiff placed a ladder against the main line of pipe, with brads in the foot to hold it from slipping. He then mounted the ladder and stood thereon with one foot, the other braced against a post nearby, the revolving shaft between his legs, and the safety collar with its set screw behind him. He then applied a pair of tongs and a wrench to the riser pipe, to get it in place, and, while in the position described, in making turns with the wrench, one leg of his trousers caught on the set screw, and he was thrown to the floor and received the injuries of which he complains. The accident happened in the morning, and the place where plaintiff was working was sufficiently lighted. Wellington and his employes, of whom the plaintiff was one, furnished their own tools, chose for themselves the time and manner in which the installation work should be done, and plaintiff knew the machinery would be stopped at any time in order to facilitate the work of installation, if such action were requested. There was also evidence tending to show that the way in which plaintiff attempted to do the work in which he was engaged was not safe; that by erecting a suitable platform on which to stand instead of using a ladder plaintiff could have performed his work with safety, and also that he could have put the riser pipe in position by working on the farther side of the main line of pipe, without danger of being caught by the set screw. There was also evidence tending to show that the set screw could be easily seen when the shaft was revolving; and there was some evidence to the effect that there is but little danger in working about a set screw, if its head is sunk into a safety collar, and that it was not necessary for the plaintiff to put up staging for the purpose of installing the riser pipe.

1. The refusal of the court to direct the jury to return a verdict for the defendant is assigned as error, and, in support of this assignment, it is argued here that the evidence does not show that plaintiff in error was guilty of negligence in permitting the projecting set screw on the shaft, where plaintiff was injured; second, that it appears from the evidence that plaintiff was guilty of contributory negligence in attempting to place the riser pipe in place while the shaft was in motion, and without erecting a platform upon which to stand when working; third, that the danger of coming in contact with the revolving shaft, in adjusting the riser pipe in the manner attempted by plaintiff, was open and apparent to any person, and, in choosing to work close to the shaft while it was in motion, the plaintiff must be held to have assumed the risk of the danger attending such work. These contentions have been very strongly urged by counsel for the plaintiff in error, but in our opinion all of them, in view of the evidence above stated, were properly submitted to the jury for decision. The rule is:

"When the evidence is conflicting, or when reasonable men might differ as to the inferences which ought to be drawn from the undisputed evidence, the question of negligence or contributory negligence is not one of law, but of fact." *Davies v. Oceanic Steamship Co.*, 89 Cal. 286, 26 Pac. 827.

And in section 53, *Shearman & Redfield on the Law of Negligence*, it is said:

"There are no abstract rules defining so clearly the duties of men, under all circumstances, that the court can state them without passing upon any question of fact. The extent of the defendant's duty is to be determined by a consideration of all of the surrounding circumstances. The law imposes duties upon men according to the circumstances in which they are called to act. And, although the law defines that duty, the question whether the circumstances exist which impose that duty upon a particular person is one of fact. In very many cases the law gives no better definition of negligence than the want of such care as men of ordinary prudence or good men of business would use under similar circumstances."

Negligence is defined in Cooley on Torts, p. 630, as:

"The failure to observe, for the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other suffers injury."

In considering whether the evidence was sufficient to warrant the court in submitting to the jury the question of defendant's alleged negligence, it must be remembered that plaintiff was in defendant's mill by its invitation and for its benefit, and, this being so, the defendant owed to the plaintiff the duty of providing a reasonably safe place for him to work; the duty of not negligently exposing him to a danger which was not apparent, and which therefore ordinary care would not require him to guard against. There are cases, it is true, in which it has been held as matter of law that it is not negligence for a master to have in his mill or factory an unguarded set screw. *Hale v. Cheney*, 159 Mass. 268, 34 N. E. 255; *Rooney v. Sewall & Day Cordage Co.*, 161 Mass. 153, 36 N. E. 789; *Keats v. National Heeling Mach. Co.*, 65 Fed. 940, 13 C. C. A. 221; *Goodnow v. Walpole Emery Mills*, 146 Mass. 261, 15 N. E. 576; *Dillon v. National Coal Tar Co.*, 181 N. Y. 215, 73 N. E. 978; *Ford v. Mt. Tom Sulphate Pulp Co.*, 172 Mass. 544, 52 N. E. 1065, 48 L. R. A. 96. But we think the better rule is that the question whether there is or is not negligence in the maintenance of such a screw, or in allowing dangerous machinery to remain unguarded, is one of fact to be determined by the jury; except when, upon the case presented, it is seen that by reason of the particular location of the projecting screw, or unguarded machinery, with reference to the place where the duties of the plaintiff required him to be, but one conclusion could be reached by reasonable men as to the fact, then the court may take the question from the jury and determine it as matter of law. *Powalske v. Cream City Brick Co.*, 110 Wis. 461, 86 N. W. 153; *Homestake Min. Co. v. Fullerton*, 69 Fed. 923, 16 C. C. A. 545; *Pruke v. South Park Foundry Mach. Co.*, 68 Minn. 305, 71 N. W. 276; *Glens Falls Portland Cement Co. v. Travellers' Insurance Co.*, 162 N. Y. 399, 56 N. E. 897; *Guinard v. Knapp-Stout & Co. Company*, 95 Wis. 482, 70 N. W. 671.

Now, the fact appearing in the case before us that the screw was so far above the floor as not to endanger employes of defendant when attending to their ordinary duties in the mill is not conclusive upon the question of defendant's alleged negligence, because plaintiff's duty required him to work near the projecting set screw, and, if it be true, as testified to by some of the witnesses, that he would have been in no danger if it had been protected, then it certainly was a question of fact whether in the exercise of ordinary care the defendant ought not to

have so protected the screw that one whose duties required him to work near it would not, if himself exercising proper care, have come in contact with it. Was the danger of such contact one so remote that a reasonably prudent man would not have thought it necessary to guard against it? This was a pure question of fact for the jury.

And so upon the question of plaintiff's alleged contributory negligence. Assuming the plaintiff's evidence to be true that he did not know of the presence of the projecting screw, that he did not think it projected, because of the safety collar on the shaft, that the manner in which he was working was not dangerous, if the screw had been properly set in the safety collar, then certainly it cannot be held as matter of law that he was negligent in working in the way he did, without taking other precautions against accident. Some men might conclude that he ought to have erected a platform or caused the mill to have been stopped while he was engaged in putting the riser pipe in position, and it may be conceded that a very careful man would have done so; but it was peculiarly a question for the jury to say whether a man of ordinary prudence would under the circumstances testified to by plaintiff, or in view of the conditions as they appeared to him, have deemed it necessary for his safety that the mill should be stopped, or that a platform should be constructed upon which he could stand while endeavoring to put the pipe in place. Nor can it be said that the plaintiff voluntarily assumed the risk of the injury he sustained, unless he knew, or by the exercise of reasonable care might have known, of the existence of the projecting screw, and whether he did know, or ought to have had this knowledge, was a question of fact upon the evidence, and properly submitted to the jury.

2. The plaintiff, when under examination as a witness, was asked the following question:

"If one observed a safety collar on a revolving shaft, state whether or not he would have a right to assume that the safety collar properly protected the set screw?"

This was objected to "as leading and asking for a conclusion of the witness, and invading the province of the jury." The objection was overruled, and the question was answered in the affirmative. The action of the court in overruling the objection to the above question is assigned as error. The objection ought to have been sustained, but it is clear from the record that the error was without prejudice to the defendant. The witness had theretofore testified:

"The purpose of a safety collar is to protect a set screw from catching in any one's clothing, or catching any part of the person working around a place of that kind. That is where it gets its name, safety collar. The purpose of the safety collar is to protect a party from coming in contact with a set screw."

The witness having thus testified concerning the office of a safety collar, the defendant was not prejudiced by the further statement of the conclusion or opinion of the witness that one acquainted with machinery and knowing the purpose of safety collars, seeing one on a revolving shaft, would have the right to assume that it protected a set screw. "If the statement of inference, conclusion, or judgment

is accompanied by an enumeration of the facts on which it is based, the error, if any, is usually harmless, as the jury can estimate the true probative value of the statement." 17 Cyc. 60. In *Langworthy v. Township of Green*, 88 Mich. 207, 50 N. W. 130, in holding that it was not prejudicial error to permit a witness to testify that he was driving as carefully as a man could at the time when he was thrown from a wagon, the court said:

"The rule is that, where the court or jury can make their own deductions, they shall not be made by those testifying; but where the witness gives fully and succinctly, as in this instance, the facts upon which he bases that conclusion, there is no presumption of prejudice."

3. There is no conflict between the general verdict and the special findings of the jury. The finding that the plaintiff would not have been injured, if the shaft had not been revolving, is the statement of a self-evident fact, but it does not follow therefrom that the plaintiff failed to exercise ordinary care in attempting to adjust the riser pipe without having the machinery stopped; nor is the other finding, that the plaintiff in error would have stopped the machinery if he had been requested, equivalent to a finding that it was not guilty of negligence in permitting the screw to project from the safety collar.

4. Numerous errors are assigned in relation to instructions given, and the refusal to give certain instructions requested. These assignments do not require discussion, and it is sufficient to say, that the case was fully and fairly submitted to the jury by the instructions given, and no error was committed by the court in refusing to give other instructions requested by the defendant.

Judgment affirmed.

(156 Fed. 464.)

GILMORE v. McBRIDE.

(Circuit Court of Appeals, Ninth Circuit. October 14, 1907.)

No. 1,348.

1. WRIT OF ERROR—REVIEW—VERDICT OF JURY.

On a writ of error to a federal court in an action at law, where the evidence was conflicting, the verdict is conclusive in the appellate court on every question of fact embraced within the issues submitted to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, §§ 3935-3937.]

2. ATTORNEY AND CLIENT—SUIT BY ATTORNEY FOR SERVICES—NOTICE OF LIEN AS ADMISSION OF VALUE.

In an action by an attorney to recover a reasonable fee for services rendered in conducting an action, the fact that plaintiff filed a notice claiming a lien in such action is not a conclusive admission on his part that the value of his services did not exceed the sum claimed in such notice, but the question of the weight to be given to such notice as an admission is one for the exclusive determination of the jury under all the evidence in the case.

3. SAME—EVIDENCE OF VALUE OF SERVICES—VALUE OF PROPERTY INVOLVED IN SUIT.

In determining the reasonable value of services rendered by an attorney, it is proper to consider the value of the property in litigation, and

where such property consisted of an interest in a mining claim which was recovered by the attorney for his client, in a subsequent action by him to recover for his services, evidence is admissible to show the market value of such interest, not only when recovered, but also up to the time of trial, if still owned by defendant, as well as the amount he has actually received as his share of the proceeds of the working of the claim.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 870.]

4. APPEAL AND ERROR—REVIEW—HARMLESS ERROR.

Errors in permitting a witness to testify to values without his competency having been shown, and in stating facts from hearsay, were harmless and not ground for reversal of the judgment, where the competency of the witness was shown on his cross-examination, and the facts to which he testified upon hearsay were corroborated by the testimony of the adverse party.

In Error to the District Court of the United States for the Second Division of the District of Alaska.

A. G. McBride (C. S. Johnson and A. J. Daly, of counsel), for plaintiff in error.

Charles Page, Edward J. McCutchen, and Samuel Knight, for defendant in error.

Before GILBERT, Circuit Judge, and DE HAVEN and HUNT, District Judges.

DE HAVEN, District Judge. This was an action at law to recover the value of services alleged to have been rendered to the defendant by the plaintiff as an attorney, in an action brought by the defendant to recover an undivided interest in a mining claim known as the "Daisy Placer Claim," situate in Nome mining district, Alaska. The complaint alleges that the reasonable value of the services so rendered was, and is, \$2,500; that \$644.75 has been paid on account thereof, leaving a balance of \$1,855.25 due to plaintiff.

The answer put in issue the allegations of the complaint, and, in addition thereto, alleged that defendant did not employ plaintiff alone to conduct the litigation referred to in the complaint, but employed the firm of Davis & Gilmore for that purpose; that plaintiff was a member of that firm; that the agreement between defendant and said firm, in relation to such employment, was that the firm was to be paid a reasonable fee to be fixed by the defendant; that the amount of such fee was fixed by the defendant in the sum of \$500; that plaintiff was paid \$144.75 in excess of that amount; and defendant by way of counterclaim demanded a judgment against plaintiff for said sum of \$144.75.

The case was tried by a jury, and a verdict rendered in favor of the plaintiff for the sum of \$1,605.25, and for this amount and costs judgment was thereupon given in favor of the plaintiff. The cause is brought here by the defendant on writ of error.

1. It is most earnestly insisted by the plaintiff in error that the verdict is against the evidence. But the rule is:

"Unless there is an entire want of evidence upon which to base the verdict returned by the jury, such verdict is conclusive here as to every fact embraced within the issues submitted to the jury for decision. This results from the well-settled rule that on a writ of error the appellate court can only con-

sider errors of law, and that the review under such a writ does not extend to matters of fact." *Graham v. Earl*, 92 Fed. 155, 34 C. C. A. 267.

See, also, *Zeller's Lessee v. Eckert*, 4 How. 289, 11 L. Ed. 979; *King v. Smith*, 110 Fed. 95, 49 C. C. A. 46, 54 L. R. A. 708; *Parsons v. Bedford*, 3 Pet. 433, 7 L. Ed. 732.

In this case there was a sharp conflict in the evidence as to the terms of the contract, under which the plaintiff rendered the services referred to in the complaint, and a like conflict upon the issue whether the plaintiff was alone retained by the defendant, or whether the firm of Davis & Gilmore was employed, and also as to the reasonable value of the services rendered by the plaintiff.

The case, then, upon the record before us, is not one in which there is no evidence at all to sustain the verdict, and, under the law as above stated, "the verdict is conclusive here as to every fact embraced within the issues submitted to the jury for decision." The case of *Central Railroad v. Pettus*, 113 U. S. 116, 5 Sup. Ct. 387, 28 L. Ed. 915, cited by the plaintiff in error, in which the Supreme Court reduced the amount allowed by the Circuit Court to an attorney as a fee, does not sustain his contention that this court may, upon its own view of the evidence, determine whether the fee allowed to the plaintiff by the verdict was a reasonable one or not, and also whether the jury ought not to have found in favor of the plaintiff in error upon the other issues. The case cited was an equitable action, and cases in equity are heard in the appellate court upon the evidence; but, in an action at law, the rule is otherwise; and when, as here, the evidence is conflicting, the verdict must be accepted as a correct determination of the issues of fact.

The fact that, after the trial of the action in which the services here sued for were rendered, the plaintiff and an attorney whom he had employed to assist him filed a notice claiming a lien in the sum of \$1,000, "for fees and services together with expenditures on account of costs and disbursements," made by him in that action, was not a conclusive admission upon the part of the plaintiff that the value of his services, and the costs and disbursements made by him in that action, did not exceed the sum of \$1,000. The question of the weight to be given this notice as an admission against the claim made by the plaintiff in this action was one for the exclusive determination of the jury, and to be decided by them in view of the reasons given by the plaintiff for filing said notice, and the other evidence in the case; and, in submitting that question, the court properly instructed the jury:

"That the plaintiff is not limited in the amount he may recover, if the evidence warrants a recovery for more, by the amount set forth in the so-called attorney's lien filed by him, but you must be guided to a conclusion by what in your opinion, from the examination of all the evidence in the case, including the evidence of the filing of the lien, is a reasonable and fair compensation for the services rendered by the plaintiff for the defendant."

2. Evidence of the market value of the Daisy placer claim at various times between the date of the commencement of the action of *McBride v. McCoy et al.*, in the year 1901, down to the date of the trial of the case at bar, was admitted, and also evidence in relation to the value of the gold received by the plaintiff in error during the same time, as his

share of the gold taken from that mine. The admission of this evidence is assigned as error, but we think it was relevant as bearing upon the question of the reasonable value of the plaintiff's services.

In determining the reasonable value of services rendered by an attorney, it is certainly proper to consider the value of the property in litigation, and the consequent pecuniary benefit realized by the client as the result of the attorney's skill and labor. We do not agree with the plaintiff in error that such evidence should be confined to the date of the rendition of the judgment in which the property was recovered, but the inquiry may take a wider range, and include its value at the time of the trial, if still owned by the defendant. In other words, in such a case, the present value of the property recovered is not too remote for the consideration of the jury. It tends to show the benefit which the defendant has actually received as the result of the attorney's services, an inquiry which we think is always open, so long as the amount of the fee remains to be settled.

3. While giving his testimony, the plaintiff was asked the following question by his counsel: "What was the current value for the Daisy claim for the year 1901?" This was objected to, upon the ground that the witness had not shown himself qualified to state. The objection was overruled. Defendant excepted, and witness answered that its value in 1901 was \$100,000; that he thought it could have been sold for that sum easily. And in answer to the question: "What has been taken out of the property since that time, if you know?" the witness proceeded to state what had been told him in relation to that matter, by a Mr. Orton, the acting manager of the claim. Objection was made to his giving evidence of what had been told him by Mr. Orton, in relation to such receipts. The objection was overruled, and the plaintiff answered that he had been told by Mr. Orton that \$130,000 was taken from the claim in cleaning up in the spring. In overruling these objections, the court erred, but the errors were without prejudice to the defendant, for upon the cross-examination of the witness it was shown that he possessed sufficient knowledge to entitle him to give testimony in relation to the value of the claim; and the error in permitting the plaintiff to testify as to what Orton had told him about the amount of gold taken from the mine was cured by the deposition of defendant, in which he stated that his share of the output of the mine for the year referred to was about \$4,000. This, of course, was net, and, as defendant's interest was $\frac{1}{24}$, his testimony was substantially the same as the hearsay evidence to which objection was made.

4. There are 46 assignments of error in the record, but the foregoing opinion covers all which in our opinion require any extended discussion by us.

The jury were fully and fairly instructed in relation to all of the issues, and no error was committed by the court in its refusal to give any instruction requested by the defendant not covered by the charge actually given.

We find no error in the record.

Judgment affirmed.

(156 Fed. 468.)

MUNROE v. FRED T. LEY & CO.**SAME v. EDISON ELECTRIC ILLUMINATING CO. OF BOSTON.**

(Circuit Court of Appeals, First Circuit. October 22, 1907.)

Nos. 698, 699.

1. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMED RISK.

A lineman, engaged with others in removing wires from poles, who was injured by the falling of a pole on which he was at work, caused by its being rotten beneath the sidewalk in which it was planted, cannot be held to have assumed the risk from such danger under the circumstances explained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 610, 612.

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

2. SAME—ACTION FOR INJURY—QUESTIONS FOR JURY.

In an action by a lineman employed with others in removing electric light wires from the poles on which they were strung to recover for an injury caused by the falling of a pole on which he was at work, it was shown that the cause of the injury was the negligent method of doing the work; that the act of negligence which was the immediate cause of the falling of the pole was done by a workman by direction of one of two men who were standing on the ground, and not working with their hands, but giving directions to the workmen. *Held*, that such evidence was sufficient to entitle plaintiff to go to the jury on the question whether or not such men were, or either of them was, "entrusted with and exercising superintendence and whose sole or principal duty was that of superintendence," so as to render the defendant, as employer, liable for his negligence under the Massachusetts employer's liability act (Rev. Laws Mass. c. 106, § 71).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1068-1088.]

3. SAME—ACTION FOR INJURY—WHEN OWNER OF PREMISES IS NOT LIABLE.

A subordinate corporation contracted with an electric illuminating company, which controlled a number of plants, for all its work of reparation and rebuilding, and in the contract agreed to assume all risks in reference thereto. *Held*, that the major corporation was under no liability, either at common law or under the employer's liability statutes of Massachusetts, for any injury arising to a lineman employed by the subordinate corporation in the work of reparation or rebuilding on its premises, or about its works, through the negligence of the subordinate corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1251.]

In Error to the Circuit Court of the United States for the District of Massachusetts.

George H. Tinkham (Simon E. Duffin, on the brief), for plaintiff in error.

Frederick P. Cabot (Henry F. Hurlburt and Charles M. Davenport, on the brief), for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. The plaintiff in error in each case was the plaintiff below, so that there will be no confusion in describing

the parties. In each there was a trial by jury, and the Circuit Court directed a verdict for the defendant, which was followed by a judgment accordingly; and the plaintiff took out these writs of error.

In the suit against Fred T. Ley & Co., the facts, as stated by the plaintiff, were as follows:

"This is an action of tort, brought by John D. Munroe, an alien, who while working at the top of an electric light pole was thrown to the ground by its breaking off a little below the surface of the ground. The declaration contained six counts, the first three at common law, and the last three under the employer's liability act of Massachusetts.

"The plaintiff was one of a gang of men, working under the directions of a foreman, which was engaged in removing the wires from a line of 13 electric light poles about 12 years old. This work was being done preparatory to removing these poles; the system having been changed from an overhead to an underground one. Upon these poles were four heavy wires, and from them 12 similar wires had been removed within a year prior to the accident. The poles were set in a brick sidewalk, such as is common in the city of Boston, were square, painted, and about 40 feet high. While at the top of one of these poles, the plaintiff was thrown to the ground by the pole snapping off a little below the surface. This pole was sound above ground, but was rotten below the surface. The defendant had never made a contract, written or verbal, with the linemen in its employ by which the latter were to undertake the duty of inspecting poles for interior defects, nor had it given its linemen any instructions to that effect, either written or verbal, nor was the plaintiff furnished with the necessary tools with which to inspect for interior defects. The plaintiff had never worked upon this line of poles. He was not informed of the age of the line, nor that 12 heavy wires had been removed from them within a comparatively short time before the accident. The poles and wires belonged to the Edison Electric Illuminating Company of Boston, and the defendant was doing the work of removal under a written contract with the latter company.

"On the morning of the accident, the linemen, acting under a general order, were untying the wires from the tops of the poles. One of the linemen, Pring, not having his pliers, the tool used by linemen to untie wires, was ordered by the foreman, MacDonald, to cut the wires on the fourth pole, which he did. At the time the wires were cut at the fourth pole, the wires on the fifth pole had been untied, and the plaintiff was on the top of the sixth pole and did not know of the cutting. Dorchester street, upon which the remaining seven poles were located, takes at this point where the sixth pole was located a sharp dip downhill. When the sixth pole snapped off, it fell in the direction of the seventh and remaining poles."

In addition to the above, it should be said that there was some evidence showing, not only that MacDonald was giving orders to the men, but also one Leyden. It is claimed by the plaintiff that the fact that the pole was decayed was within the rules with reference to the duty to furnish safe conditions to work in; that the defect of rottenness might have been discovered by reasonable inspection; that it was the company's duty to inspect; that there was no assumption of risk on the part of the plaintiff; that there was error in the court's refusing to permit the plaintiff to show that there was a custom for linemen working under the circumstances shown by the case not to inspect poles for interior defects; that there was also error in the court's refusing to permit the plaintiff to testify that he relied on MacDonald or Leyden to inform him whether or not the line was an old line; and that there were other errors which have not been particularly brought to our attention. The view we take of the case, however,

relieves us from the necessity of passing on any question except the broad one that the court erred in directing the jury to return a verdict for the defendant, and on this solely with reference to the statutory topic of superintendence. We will direct that the judgment be reversed and a new trial had on only the counts which are based upon the statute, which is found in Rev. Laws Mass. c. 106, § 71, as follows:

"If personal injury is caused to an employee, who, at the time of the injury, is in the exercise of due care, by reason of: * * *

"Second, The negligence of a person in the service of the employer who was entrusted with and was exercising superintendence and whose sole or principal duty was that of superintendence, or, in the absence of such superintendent, of a person acting as superintendent with the authority or consent of such employer."

Clearly Munroe was not at fault for not ascertaining that the pole was rotten. None of the cases cited are analogous for various reasons. The rottenness was concealed by a brick sidewalk. Under the general rule, as settled by the Supreme Court over and over again, a person employed is not bound to use reasonable care to ascertain the safety of what belongs to his employer, and is bound only by what he "knows or ought to have known"; and, in the present case, there is no sufficient evidence showing that a different rule applies to linemen. Even if there were any evidence of value that generally linemen are expected to examine poles before climbing them to ascertain whether decayed or not, it would not apply to the present case, because, first, the linemen here were not furnished with tools to enable them to dig out the sidewalk around the poles, and, second, the orders given them by Leyden and MacDonald prohibited them from doing anything of that nature. As soon as they were on the ground, the linemen were driven up the poles in haste, and under persistent orders, with oaths, to "hump themselves," so to speak. Therefore the circumstances precluded any examination by them, whatever might have been the custom usually, and whatever the circumstances of the decisions cited by the defendant.

However, it seems to us to be of no consequence whether Munroe should have examined the condition of the pole as to rottenness or not, because its rottenness was not the *causa causans*. If the work had been done in a proper manner, the accident would not have occurred. The plaintiff had a right to go to the jury on the proposition that the proper manner was, first of all, to have untied all the wires. If this had been done, the pole would have stood, so far as any evidence in the case shows otherwise. There were 13 poles in all. Munroe was on the sixth pole. The poles from the sixth to the thirteenth were on a downhill road, so that the tendency of seven poles was to pull the sixth pole towards them and downhill. The wire was cut on the fourth pole, and had been untied on the fifth pole, so there was nothing to hold the sixth pole, on which the plaintiff was, against the downhill pull of poles 7 to 13 each, inclusive. Therefore, as the record shows, when the sixth pole snapped off, it fell, and, as of course, in the direction of the seventh pole.

The plaintiff puts this proposition as follows:

"The plaintiff contends that the manner in which the work was conducted by the foreman, MacDonald, was negligent, and the negligence brought about the injury to the plaintiff."

He puts this at our bar in such a way as to preclude all other efficient causes, because, he says:

"This ordering of Pring to cut the wires on the fourth pole was the negligent act of the superintendent which the plaintiff avers brought about his injury."

The main question in the case is whether MacDonald or Leyden was a person in the service of the Ley Company "entrusted with and exercising superintendence, and whose sole or principal duty was that of superintendence"; or, second, one who, in the absence of such superintendent, was a person "acting as superintendent with the authority or consent of such employer." These words of the statute seem to represent plain English, and so plain that they neither need, nor are capable of, categorical definition. So far as we have examined the Massachusetts cases, none of them undertakes to give such a definition. Many of them have been engaged in determining, not whether under the circumstances of the case there was any person "exercising superintendence," but more particularly with reference to the questions arising from the use of the words "sole or principal." Some have stated certain inclusive rules; that is, rules which show that certain persons are within the statute. But none of them, as we have said, assumes to give a complete definition. For the reason we have stated, to do this is not practicable.

The facts of the present case are that no one undertakes to testify that either MacDonald or Leyden did any work with their hands. They were giving orders, and were engaged entirely in so doing, and nobody else was giving orders. An illustrative fact is that one witness states that MacDonald was standing on the ground doing nothing excepting giving orders. He did not see him climb any poles, and the witness took his orders from him, and the principal orders were directed to all the linemen. Another one testifies that MacDonald gave him orders, with an oath, to get up the pole and stop his "kidding," and that MacDonald "was in the gutter, looking out for the wires, and giving orders to the ground men in reference to them." Another one testifies that he took orders as a lineman from Leyden and MacDonald; and another one that both MacDonald and Leyden "gave orders," and that MacDonald said: "Get your tools and strip that pole." The record is full of this kind of testimony. There is no question that either MacDonald or Leyden gave the order to cut the wire which resulted in Munroe's injury.

It seems plain therefore that the plaintiff had a right to go to the jury on the issue that MacDonald and Leyden, or one of them, had, so far as doing this particular work was concerned, full charge. They were doing it wholly in accordance with their own notions as to the method of doing it, subject, of course, as every person is who is placed in authority, to the usages and methods of doing work generally, or of doing the particular work of the particular person or corporation whom they represent.

Looking at the various decisions of the Supreme Judicial Court of Massachusetts, it seems to us that the observation of the judge at nisi prius in *Malcolm v. Fuller*, 152 Mass. 160, 163, 25 N. E. 83, was correct, so far as it went:

"A superintendent is a man having the control, with the power of authority. That is to say, when he speaks, the workmen are to obey, not because he advises them, or requests them, or hopes they will, but because, by virtue of his position, they have agreed to obey him. That is the nature of his authority."

Thus, the question of "exercising superintendence" is one, not of the magnitude of the job, but of the nature and power of the person in charge thereof. One who is on the ground, dissevered from all other authority, and having full power at the time over the work to be done, even though only temporarily, may be "exercising superintendence." *McPhee v. Scully*, 163 Mass. 216, 217, 220, 39 N. E. 1007. We have carefully examined a number of the decisions of the Supreme Judicial Court of Massachusetts with regard to this topic, and have selected here only the two which seem the most typical of the case before us. Taking together all those which we have examined, we find nothing therein which prevents our making such an application here of the statute in question as its plain English seems to require.

The record raises a question whether MacDonald or Leyden was superintending the work; and, so long as there is a question of that character, it, of course, follows that it is doubtful whether either one of them was. So, also, the case might easily have been made more definite and clear by a very few questions put to the witnesses; but we have here the fact that the plaintiff may well contend that MacDonald and Leyden, one or both of them, were in full charge of the job, giving orders to the men, and apparently "exercising superintendence." Whether one or both united therein may or may not prove of consequence, because the fault in the method of doing the work might have been the joint fault of both.

The result is that the evidence shows that the occasion of the injury to Munroe was the negligent method of doing the work; also, there is enough in the record to entitle the plaintiff in the case against Fred T. Ley & Co. to go to the jury under the provision of the statute which we have cited. Therefore the judgment there must be set aside, and a new trial ordered.

Coming now to the suit against the Edison Electric Illuminating Company, the record shows an agreement between the Ley Company and the Edison Company by virtue of which the Ley Company entered into a contract with the Edison Company to become its general constructor and repairer, and to assume all risks. The nature of this contract was such that the Ley Company might be called on to take up the Edison Company's work, whatever the condition of repair or safety might be. It is difficult to see how, under this contract, the Edison Company could be responsible to the Ley Company for the condition of its poles or anything else; and, if the Edison Company was under no obligation to the Ley Company, it is difficult to see how it could be under obligation to its employes. The plaintiff relies on the

general rule as explained in Pollock's Torts (6th Ed. 1901) 492, 493, and cases cited; Elliot v. Hall (1885) 15 Q. B. D. 305, 315; and on Hayes v. Philadelphia Company, 150 Mass. 457, 23 N. E. 225. It seems to be the statutory rule of Massachusetts that under the employer's liability act any agreement between the owner of premises and the contractor that the contractor will assume all responsibility does not affect the employé of the contractor. Wagner v. Boston Elevated, 188 Mass. 437, 442, 74 N. E. 919, and Sullivan v. New Bedford Gas Company, 190 Mass. 288, 292, 76 N. E. 1048. Nevertheless, it would also seem that the rule on which the plaintiff relies, and even the Massachusetts statute, as interpreted by the Massachusetts courts, cannot apply to the case of a general jobber like the Ley Company here, who itself assumes all responsibility, thus relieving the party with whom it contracts of any duty in the premises.

However, it is not necessary to go into the above questions, because, as we have already stated, according to the plaintiff's case, the *causa causans*, the truly efficient cause of the injury, was not the condition of the poles, but the negligence of the employés of the Ley Company in the manner in which the work was done. The undoubted condition of the facts and the position taken by the plaintiff himself would prevent him holding a verdict if he received one on any ground except that of the negligence of the Ley Company. Therefore, on this part of the case, we are justified in speaking positively to the effect that the plaintiff has no cause against the Edison Company.

Judgments will be entered as follows:

In No. 698, John D. Munroe v. Fred T. Ley & Company, the judgment is reversed, and the case is remanded to the Circuit Court, with directions to set aside the verdict, and to grant a new trial on such count or counts of the declaration as are based on the second clause of section 71 of chapter 106 of the Revised Laws of Massachusetts; and the plaintiff in error recovers his costs of appeal.

In No. 699, John D. Munroe v. Edison Electric Illuminating Company of Boston, the judgment of the Circuit Court is affirmed; and the defendant in error recovers its costs of appeal.

(156 Fed. 473.)

LEAK v. LEAK.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1907.)

No. 1,443.

DIVORCE—APPEAL—APPEALABLE JUDGMENT UNDER ALASKA CODE.

Carter's Alaska Code, pt. 4, § 504, which provides for appeals from the District Court for the district of Alaska to the Circuit Court of Appeals for the Ninth Circuit in civil causes where the amount involved or the value of the subject-matter exceeds \$500, does not authorize an appeal from a decree granting or denying a divorce or awarding the custody of their minor children to one or the other of the divorced parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 563.]

Appeal from District Court of the United States for the First Division of the District of Alaska.

On Motion to Dismiss Appeal.

Jno. R. Winn and Newark L. Burton, for appellant.
Malony & Cobb, for appellee.

Before GILBERT, Circuit Judge, and DE HAVEN and HUNT, District Judges.

GILBERT, Circuit Judge. The motion to dismiss the appeal must be sustained. The appeal is taken from a decree of the District Court for the District of Alaska, and particularly from that part thereof which grants a divorce and separation to the appellee, and awards him the care and custody of one of the minor children of the parties. Section 504 of Carter's Alaska Code, pt. 4, provides for appeals to this court from the District Court of Alaska in civil causes only in cases where the amount involved, or the value of the subject-matter, exceeds \$500. There is no statutory provision for appeal in cases where the value of the subject-matter of the controversy cannot be measured in money, and this court is given no power to review the judgment of the District Court of Alaska in decreeing or denying divorce, or in awarding the custody of their minor children to one or the other of the divorced parties. *Simms v. Simms*, 175 U. S. 162, 20 Sup. Ct. 58, 44 L. Ed. 115.

(156 Fed. 474.)

LEAK v. LEAK.

(Circuit Court of Appeals, Ninth Circuit. October 14, 1907.)

No. 1,435.

1. DIVORCE—APPEAL—APPEALABLE JUDGMENT UNDER ALASKA CODE.

A decree of the District Court of Alaska granting or denying a divorce or awarding the custody of minor children in a divorce suit is not appealable under Carter's Alaska Codes, pt. 4, § 504, which provides for appeals only in cases involving money or property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 563.]

2. SAME—ALLOWANCES TO WIFE—ALASKA STATUTE.

Under Carter's Alaska Codes, pt. 4, § 471, which authorizes the court in a divorce suit in its discretion to provide by order that the husband pay such an amount of money as may be necessary to enable the wife to prosecute or defend the suit, and also for the care and custody and maintenance of the minor children of the marriage during the pendency of the action, the court may properly order the husband to deposit a sufficient amount to pay the costs and expense of an appeal by the wife, and may also allow to the wife the cost of medical attendance necessarily incurred pending the suit for a minor child in her custody, but it has no power to award her a sum to cover the cost of depositions previously taken by her; the allowance authorized by the statute being for future expenses only.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 642.]

Appeal from the District Court of the United States for the First Division of the District of Alaska.

Malony & Cobb, for appellant.

Jno. R. Winn and Newark L. Burton, for appellee.

Before GILBERT, Circuit Judge, and DE HAVEN and HUNT, District Judges.

DE HAVEN, District Judge. This is an appeal from the District Court of Alaska, Division No. 1. The action was brought by the husband, who is the appellant, to obtain a decree of divorce from his wife, the appellee, and for the care and custody of their minor children. The cause of action, as stated in the complaint, was for adultery and for cruel and inhuman treatment, but the appellant was permitted at the trial to amend his complaint by withdrawing the charge of adultery. The appellee answered, denying the allegations of the complaint, and also filed a cross-complaint praying for a divorce, and that the care and custody of the children be given to her. The court found the issue of cruel and inhuman treatment in favor of the appellant, and thereupon entered its decree dissolving the marriage relation between the parties, and awarded to the appellant the custody and control of one child, Melville Sloan Leak, and the care and custody of the other, Victor Leak, to the appellee. The decree further adjudged that the appellee should recover from the appellant the sum of \$515.90 to satisfy certain orders made by the court during the pendency of the action. One of these orders directed the appellant to pay the appellee the sum of \$75.90, expenses which had been incurred by her before the date of such order, in taking certain depositions, "and the further sum of \$150 additional attorney's fee, allowed * * * attorney for defendant for defending said cause." A second order directed the appellant to pay to the appellee \$190 for the use of certain physicians who had rendered professional services to the child Victor during the pendency of the action; and another order directed him to pay to appellee \$100 per month temporary alimony. There was due on account of this last order the sum of \$100 at the date of the decree. Subsequent to the final decree the court, upon the application of the wife, appellee herein, made a further order that, in case the wife should appeal from the decree within 10 days, the appellant herein should pay into the registry of the court the sum of \$250, to be paid out as costs of her appeal, upon vouchers properly executed and delivered to the clerk of the court, or should secure the payment of such sum by a sufficient bond. The appellant has appealed from this order, and also from that portion of the decree awarding the custody of the minor child Victor Leak to the appellee, and directing him to pay appellee the said sum of \$515.90 in accordance with the orders just referred to.

The appeal from that part of the decree awarding the custody of the minor child Victor to the appellee must be dismissed on the authority of *Simms v. Simms*, 175 U. S. 162, 20 Sup. Ct. 58, 44 L. Ed. 115; *Leak v. Leak* (No. 1,443) 156 Fed. 473,¹ the opinion in which was filed October 7, 1907. The other questions do not require extended discussion. It is sufficient to say that the court did not err in its order allowing \$150 as additional compensation to the attorney for the appellee, and directing that the appellant pay the same into the registry of the court for disbursement on that account; nor do we think the court erred in directing the appellant to pay the sum of \$190 to satisfy the claim of the physicians who rendered their professional services to the

¹ 84 C. C. A. 283.

same child during the pendency of the action, and while in the custody of the appellee.

It appears from the facts recited in the order just referred to that on April 12, 1906, the child was in a critical condition, and in need of immediate medical and surgical relief. Neither of the parties would consent to the giving of the needed attention to it by the surgeon selected by the other, and there were at that time two motions pending before the court, one upon the part of the appellee for an order requiring the appellant to give her \$100, for the purpose of paying the expenses of herself and child to New York, to be operated on by specialists, and a motion by the appellant that he be given the custody of the child. The court, after hearing the testimony of physicians as to the serious condition of the child, and being satisfied that, if left to the parties to agree upon a surgeon, "no agreement would be reached, and as a result the said child would probably die, the court advised counsel for both parties" that it would not order an operation to be performed, but if at 12 o'clock midnight of that day the child remained in the same condition, and had not been given proper medical attention, the appellant's motion for a change of custody would be granted; and, being asked by appellee's counsel "how the surgeons were to be paid if the operation were performed, the court stated in the presence of all counsel that the plaintiff (appellant) would be ordered to pay therefor, and at 12 o'clock midnight, April 12, 1906, all counsel being present, appellee's counsel, "announced that the child had been given medical attention," whereupon the court denied the motion for change of custody, "and directed that the bills for said medical and surgical attention be presented," and when presented they were allowed in the amount stated in the order.

Section 471, pt. 4, of the Code of Alaska, provides:

"After the commencement of an action, and before judgment therein, the court or judge thereof may, in its discretion, provide by order as follows: First. That the husband pay or cause to be paid, to the clerk of the court, such an amount of money as may be necessary to enable the wife to prosecute or defend the action, as the case may be. Second. For the care and custody and maintenance of the minor children of the marriage during the pendency of the action."

Upon the facts above stated, the order of the court directing the appellant to pay to appellee \$190 for the purpose of enabling her to satisfy the claims of the physicians for their professional services in attending upon the child Victor was justified by the second subdivision of the section just quoted. The order of court made after the entry of the final decree, requiring the appellant, in the event of an appeal by the wife, to deposit in the registry of the court or to give security for the payment of \$250, costs on such appeal, was proper. We think, however, the court erred in its order requiring the appellant to pay to the appellee the sum of \$75.90, being the amount theretofore expended by her for taking certain depositions. The court had previously made an order directing the appellant to pay the appellee the sum of \$100 for necessary expenses which she might incur in the preparation of her defense. It appears that this sum was not sufficient, and appellee, without making further application to the court, proceeded upon her own

account, and borrowed the additional sum of \$75.90 to cover the additional cost. It has been uniformly held in states having statutes similar to section 471, pt. 4, of the Code of Alaska, before quoted, that the court in an action like this is only authorized to make an allowance to the wife for future expenses. Thus in *Beadleston v. Beadleston*, 103 N. Y. 404, 8 N. E. 736, it is said:

"The purpose of the statute is to furnish the wife means to carry on her action or to defend the same during the pendency thereof. The allowance looks to the future. There can be no necessity for an allowance to make a defense which has already been made or solely to pay expenses already incurred. * * * There is ample power in the court to make allowances from time to time to enable the wife to carry on her defense, and when she needs money for that purpose she must apply for it. But, if she has succeeded in making her defense from her own means, or upon her own credit, she cannot, before judgment, while the action is pending, have an order compelling her husband to pay such expenses; and there is no statutory authority in the court to make such an order, and thus to compel him to pay her debts."

This view was repeated by the same court in *McCarthy v. McCarthy*, 137 N. Y. 500, 33 N. E. 550. See, also, as supporting the same rule, *Loveren v. Loveren*, 100 Cal. 493, 35 Pac. 87; *Lacey v. Lacey*, 108 Cal. 45, 40 Pac. 1056. In *Loveren v. Loveren*, the court, speaking by Fitzgerald, J., said:

"If the expenses of the action have been incurred or paid by her with means derived from her separate estate or upon her credit, then there can be no necessity for an allowance by the court to enable her to do that which she has already done, and without such necessity the court has no authority under the statute to make such an order. And no better evidence can be adduced of her ability in this respect than the fact that she has been able, as the record shows, to incur these expenses and to pay them with money borrowed by her entirely upon the strength of her credit. Expenses so incurred and paid may be, where it is proper to do so, taxable as costs in the case, but they cannot be made the basis of an order within the meaning of this statute granting an allowance therefor and compelling the husband to pay them."

The appeal from that portion of the decree awarding the custody of the child Victor to the appellee is dismissed. The order made after final decree is affirmed, and the decree appealed from, in so far as it orders and adjudges that appellee recover from appellant \$515.90, is modified, by deducting from said sum \$75.90, which appellant was required to pay for taking depositions, and, as so modified, the decree is affirmed, the appellee to recover costs.

(156 Fed. 477.)

FITZSIMMONS v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1907.)

No. 1,340.

POST OFFICE—VIOLATION OF POSTAL LAWS—"LOTTERY."

A scheme by which certificates are issued by a corporation, on each of which the holder agrees to pay \$1 per week, subject to forfeiture for non-payment, and about 75 per cent. of which payments are paid into a "mutual benefit credit fund" until all certificates prior in date have matured and been canceled, when his own certificate shall mature, and he shall be

paid from such fund the sum of \$2 for each week such certificate has been in force, provided there is so much in the fund, not exceeding however \$160, is a lottery within the meaning of Rev. St. § 3894 [U. S. Comp. St. 1901, p. 2659], and any person engaged in conducting such scheme by means of letters or circulars sent through the mails is guilty of a criminal offense under said section.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Post Office, § 54.

For other definitions, see Words and Phrases, vol. 5, pp. 4245-4252; vol. 8, pp. 7710-7711.

Nonmailable matter, see note to *Timmons v. United States*, 30 C. C. A. 79.]

In Error to the District Court of the United States for the Southern District of California.

The plaintiff in error was convicted of violation of the clause of section 3894 of the Revised Statutes [U. S. Comp. St. 1901, p. 2659], which provides that no letter, postal card, or circular concerning any lottery shall be carried in the mail or delivered at or through any postoffice or branch thereof. He was the president and a stockholder of a corporation organized under the laws of California, known as the "Cumulative Credit Company." The company issued certificates, the provisions of which were held by the court below to constitute a lottery. The provisions of the certificate material to the question here involved are as follows:

"This is to certify, that ——— is entitled to and agrees hereby to pay and contribute the amount of one dollar per week to the Cumulative Credit Company, a corporation, hereinafter designated as 'the Company' at its home office at 125 South Broadway, in the city of Los Angeles, California, for the purpose of creating an expense credit fund and a mutual benefit credit fund, for the uses and purposes hereinafter provided. Said payments to be made in each consecutive calendar week following the date hereof, until this certificate shall have been canceled in its regular order in pursuance of its conditions as herein stated.

"At the option of the owner hereof, the said weekly payments may be made in advance to cover a period of not to exceed five consecutive weeks.

"If for any reason the payment of the said one dollar per week to the company be not made by the owner hereof at the time and in the manner above provided for, this certificate shall be deemed to be delinquent, and all the rights of the owner hereof, hereunder, suspended; except, in the event of this certificate so becoming delinquent, if the owner hereof shall pay to the company, in addition to the one dollar per week provided to be paid herein, for the first week of each delinquency twenty-five cents, and for each succeeding week (not to exceed nine successive weeks) of such delinquency, the sum of one dollar, then this certificate shall again become and be in full force and effect. But if said additional payments be not so made and the weekly payments as aforesaid shall become and remain delinquent for ten successive weeks, then this certificate shall immediately become null and void and of no effect, and all rights and privileges hereunder of the owner hereof shall immediately cease and determine.

"The company is hereby authorized and directed to set aside seventy-five per cent. of the sixth to the eightieth, inclusive, of the above-mentioned payments and one hundred per cent. of all payments thereafter, and place the same in the mutual benefit credit fund, from which shall be paid the amounts due on this and other like certificates as they severally shall mature as hereinafter provided, as follows:

"This certificate shall be deemed to be matured when all like certificates of prior date and number shall have been matured and canceled, and at its maturity the owner hereof, upon presentation and surrender to the company of this certificate, shall be paid by the company, from the said mutual benefit credit fund, the sum of two dollars for each calendar week of the period from and including the calendar week following the date hereof, to and including the calendar week in which the same matures; provided that there shall be sufficient money in said mutual benefit credit fund available for that purpose

to pay said amount, and provided further, that the amount so paid shall not exceed the sum of one hundred and sixty dollars; and upon payment of such sum due to the owner hereof this certificate shall be canceled by the company, and it is understood that the owner of this certificate shall be deemed at all times to be the person in whose name the same stands and appears upon the books of the company. The company is hereby authorized and directed to apply the balance of said payments, as hereinabove provided for, to the expense credit fund, to be used as the management may direct."

Walter R. Bacon, for plaintiff in error.

Oscar Lawler, U. S. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The principal question here presented is whether the scheme referred to in the mail matter described in the indictment is a lottery. The plaintiff in error urges that it is not, that, while the scheme may involve the element of chance, it lacks the element of prize which is essential to a lottery, and counsel for the plaintiff in error quotes definitions of "lottery" which include the element of prize. But in law the term "lottery" is of wide signification. In *Horner v. United States*, 147 U. S. 449, 13 Sup. Ct. 409, 37 L. Ed. 237, Mr. Justice Blatchford discussed various definitions of lottery, and among others approved that found in *Worcester's Dictionary*, in which it is defined to be "a game of hazard in which small sums are ventured with the chance of obtaining a larger value, either in money or in other articles." That definition would include the scheme which is presented by the record in the present case. And not only is this so; but we think it clear that the element of prize is to be found in the scheme. In general, it may be said that anything of value offered as an inducement to participate in a scheme of chance is a prize. As applied to a scheme such as is disclosed in this case, a prize is any inequality in value resulting from chance in the distribution of money paid back to the contributors of the same. To constitute a prize, the inequality need not necessarily be great, and the element of prize may exist in a scheme so arranged as to return to each participant something of value, or even an equivalent for all that he pays in. It is plainly to be seen that, in the scheme under consideration, it may happen that several new members may send in their first subscriptions on the same day, and that he whose subscription is by chance first numbered may obtain a great advantage over him whose number is last. That advantage is undoubtedly in the nature of a prize. The subscriber to the scheme knows full well that no increment is to be earned by his money, but that all returns are to come from his own contributions and the contributions of others. The chance of getting back from these sources double the sum that he pays in and getting it soon is the prize which lures him to make the payments. It is evident that there can be no other inducement to subscribe than the chance of securing an early or lucky number and the hope of obtaining an advantage by chance over other subscribers. But we deem it unnecessary to enter into any extended discussion of the meaning of the word "lottery," or the decisions of the courts with reference thereto, for the questions presented in the present case are in

our opinion fully covered by the decision of the Supreme Court in *Public Clearing House v. Coyne*, 194 U. S. 497-512, 24 Sup. Ct. 789, 48 L. Ed. 1092. In that case the scheme involved was similar to that which is presented in the case at bar. The plan contemplated that each person who became a member should pay \$3 as an enrollment fee, and \$1 per month for five years, and agree to co-operate by inducing others to become members, for which he was to receive his pro rata share of the total amount realized when entitled to a realization as provided at the end of five years. The plan contemplated that in the end the member who secured new members and the member who did not should receive the same amount. The court said:

"The only money paid in was a small enrollment fee of \$3 and a monthly payment of \$1 for five years. The return to the subscribing member which is called a realization is not only uncertain in its amount, but depends largely upon the number of new members each subscriber is able to secure, as well as the number of members which his co-operators are able to secure. The return to members who have been able to secure a large number of other members and to pay their own monthly dues may be very large in comparison with the amount paid in, but the amount of such return depends so largely, and, indeed, almost wholly, upon conditions which the member is unable to control, that we think it fulfills all the conditions of a distribution of money by chance. In becoming a co-operator each new member evidently contemplates that a large number, probably a large majority of those subscribing, will drop out before the end of five years. * * * The uncertainty of the amount realized upon these settlements is evident from the fact that, while a member may possibly realize as high as \$15 for every dollar invested by him, he may realize no profit at all, or, in case the business is suspended, may realize nothing."

The court held the scheme to be a lottery within the meaning of the statute. But it is urged that the *Coyne Case* is not decisive of the case at bar, for the reason that the schemes involved in the two cases differ in an essential particular. It is said that in the *Coyne Case* the member was to pay certain fixed sums for a certain fixed period and then his obligation ceased, and that thereby the creation of an adequate redemption fund was made dependent directly upon the contingency of lapses of members and the acquisition of new business, whereas, in the present case, the obligation is continuous and indefinite, and requires the member to continue his monthly payment until an amount sufficient to pay him \$160 shall be realized. It is argued that, by virtue of this provision, the amount which each member is to receive is not only not uncertain, but that it does not depend upon the number of new subscribers. It is true that in the scheme thus detailed the amount which each member is to receive is not uncertain if he keeps on making his contributions. The uncertainty lies in the time when he shall receive it, an uncertainty so great as to vitiate the scheme as fully as would an uncertainty in the amount. But not only is there uncertainty as to time, but there is uncertainty in the amount to be received as compared with the amount to be paid in. If there were but one member in the scheme, before he could realize his \$160, he would be required to pay into the company at least \$240, and to continue his regular payments until he had invested that amount. If there were more members, he might be required to pay more and for a longer time, or he might realize his \$160 in a much shorter time, de-

pending on the number of members who dropped out and the number of new members who joined and the order in which the subscriptions were numbered. In all its essential features it is the scheme which the court had under consideration and condemned in the Coyne Case.

It is assigned as error that the court in instructing the jury read and quoted from the decision of the Supreme Court in *Public Clearing House v. Coyne*; and said:

"These uncontradicted facts bring the case at bar clearly within the doctrine enunciated by the Supreme Court of the United States in the foregoing quotations, and I therefore instruct you that the business of the Cumulative Credit Company as conducted at all the times charged in the indictment and as shown by the uncontradicted evidence of the case was a lottery, and you will so find."

It is the general rule that, unless prohibited by statute, the court in charging the jury may read legal decisions or extracts therefrom containing propositions of law applicable to the case at bar. *People v. Minnaugh*, 131 N. Y. 563, 29 N. E. 750; *People v. Niles*, 44 Mich. 606, 7 N. W. 192; *People v. Bowkus*, 109 Mich. 360, 67 N. W. 319; *State v. Dearing*, 65 Mo. 530; *Kirby, Ex'r, v. Wilson et al.*, 98 Ill. 240; *State v. Chiles*, 58 S. C. 47, 36 S. E. 496. But the question is not properly before us, for the only exception taken to the charge to the jury was stated at the close of the charge in these words:

"To the giving of each and all of the said instructions for the government the defendant by his counsel then and there excepted."

In *Block v. Darling*, 140 U. S. 234, 11 Sup. Ct. 832, 35 L. Ed. 476, it was held that the general exception "to all and each part of the foregoing charge and instructions" suggested nothing for the consideration of an appellate court.

It is contended, further, that there was no evidence to sustain the verdict, in that there was no proof that the plaintiff in error mailed the documents which are referred to in the indictment. To this it is sufficient to say that there was no request for a peremptory instruction to the jury to acquit the plaintiff in error for want of evidence of his guilt. *Harless v. United States*, 34 C. C. A. 400, 92 Fed. 353, *McDonnell v. United States*, 66 C. C. A. 671, 133 Fed. 293, and cases there cited. But we have considered the evidence, and we find no merit in the contention. It was proven, and was not disputed, that at all the dates referred to in the indictment the plaintiff in error was the owner and manager of the Cumulative Credit Company, that the documents referred to in the indictment were transferred through the mails, that the most of it bore the signature of the plaintiff in error, and that there was no one else at his place of business who did or could have mailed the same. There was proof that the plaintiff in error had directed correspondents to send mail matter to him addressed, not to him, but to fictitious names for the purpose of avoiding the exclusion thereof by the post office department, and the plaintiff in error admitted that the documents described in the indictment and others admitted in evidence were signed by him and were mailed by some one in his office, he having left them on his desk for that purpose.

We find no error. The judgment is affirmed.

(156 Fed. 482.)

FITZSIMMONS et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1907.)

No. 1,341.

In Error to the District Court of the United States for the Southern District of California.

Walter R. Bacon, for plaintiffs in error.

Oscar Lawler, U. S. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. This case is in all respects similar to the case of Orlando K. Fitzsimmons v. United States, 156 Fed. 477, 84 C. C. A. 287, and presents upon the writ of error the questions of law which were under consideration in that case.

The judgment of the District Court is affirmed.

(156 Fed. 482.)

CAMBERS v. FIRST NAT. BANK OF BUTTE

(Circuit Court of Appeals, Ninth Circuit. October 14, 1907.)

No. 1,408.

PLEADING—SUFFICIENCY OF COMPLAINT—ALLEGATION OF SATISFACTION OF JUDGMENT.

Where plaintiff deposited money to indemnify his sureties on injunction bonds against loss on account of a judgment rendered against them and plaintiff on such bonds, a complaint to recover such money from the depository does not state a cause of action, where it alleges merely that the judgment was satisfied on the docket by the clerk of the court on return of an execution issued thereon "fully satisfied"; there being no allegation that the judgment has been in fact paid and satisfied. Nor is such complaint made good by an allegation that the sureties are not liable on such judgment, which is a mere conclusion of law.

In Error to the Circuit Court of the United States, for the District of Oregon.

For opinion below, see 144 Fed. 717.

A. E. Reames, Frank F. Freeman, and J. C. Veazie, for plaintiff in error.

Dolph, Mallory, Simon & Gearin, and R. L. Clinton, for defendant in error.

Before GILBERT, Circuit Judge, and DE HAVEN and HUNT, District Judges.

DE HAVEN, District Judge. This action was brought by the plaintiff to recover from the defendant the First National Bank of Butte the sum of \$10,000, and interest from August 21, 1902, at the rate of 8 per cent. per annum, and from the defendants Andrew J. Davis and George W. Andrews interest on said sum of \$10,000 at the rate of 6 per cent. per annum from April 19, 1902. The defendants Davis and

Andrews were not served with summons, and made no appearance, and the other defendant, the First National Bank of Butte, interposed a general demurrer to the complaint, upon the ground that the same does not state a cause of action against it. The demurrer was sustained, and, the plaintiff not desiring to further plead, judgment was rendered that he take nothing against said defendant, and that defendant recover its costs. The case is brought here by the plaintiff on writ of error.

The case stated in the complaint is substantially this: The plaintiff brought certain suits in the courts of Montana, in which litigation it became necessary for him to furnish injunction bonds, aggregating in amount \$12,500, and the defendants Davis and Andrews became sureties for him on these bonds. The litigation referred to resulted adversely to the plaintiff, and judgment was rendered in one of the district courts of Montana, on March 20, 1902, against him and his sureties, Davis and Andrews, upon the injunction bonds, for the sum of \$12,500. Thereafter, on April 19, 1902, the plaintiff having on deposit with the defendant First National Bank of Butte \$10,000, all of the parties to this action on that day entered into a contract, by the terms of which it was agreed that the defendant First National Bank of Butte should retain said sum of \$10,000 on deposit, for the purpose of indemnifying Davis and Andrews against loss by reason of having become sureties on such injunction bonds and their liability on said judgment; and also to indemnify the sureties upon any bond which might be given by the plaintiff to stay the execution of said judgment, pending an appeal therefrom to the Supreme Court of Montana. The judgment was not appealed from, and no such stay bond was given, and the deposit remained in the First National Bank of Butte, for the protection of defendants Davis and Andrews, against the liability on the judgment just referred to.

The complaint further alleges that neither of the defendants has paid any part of said judgment; "nor are they, or either or any of them, liable to pay such judgment, or any part thereof; nor can the same, or any part thereof, be enforced against them, or either or any of them."

The complaint further sets forth that an execution upon said judgment was duly issued and placed in the hands of the sheriff of Silver Bow county, Mont., with directions to collect the sum for which the judgment was rendered, and that on the 21st day of August, 1902, while the same was in full force and effect, the sheriff "returned said execution fully satisfied to the clerk of said district court." It is then alleged:

"That by the laws of the state of Montana then in force, it became and was then the duty of said clerk to enter satisfaction of said judgment upon the judgment docket of said court, and said clerk did thereupon, on said 21st day of August, 1902, duly enter a satisfaction of said judgment upon said judgment docket, and satisfy said judgment as to each and all the defendants in said cause, and said satisfaction, when so entered, constituted a full and complete satisfaction and discharge of said judgment, and the same was at said time fully satisfied and discharged. * * * That said satisfaction of judgment has never been vacated, set aside, or amended, and by the laws then and now in force in the state of Montana, the time within which such judgment could have been reinstated, or the satisfaction thereof vacated, has long since gone by."

The demurrer to the complaint was properly sustained. There is in it no averment that the judgment referred to therein has in fact been paid, or that the defendants Davis and Andrews have been released by the judgment creditor from their liability to pay said judgment, or that plaintiff has by any act of theirs been released from his obligation to let the said sum of \$10,000 remain on deposit for their protection against liability on such judgment; and the allegation of some one of these facts is necessary in order to state a cause of action, entitling the plaintiff to the relief which he demands. The allegation that the defendants, nor either of them, are liable, "to pay said judgment or any part thereof, nor can the same or any part thereof be enforced against them, or either or any of them," is the statement of a mere conclusion of law, and gives no strength to the complaint.

The cause of action which the plaintiff attempts to state, in so far as it depends upon the satisfaction of the judgment therein mentioned, seems to rest upon the alleged facts that the sheriff returned the execution issued upon the judgment as "satisfied," and that thereupon the clerk entered such satisfaction upon the record; but the complaint does not show that the sheriff stated in his return that he had collected the amount called for by the execution, and yet, unless the sheriff made such a return, the ministerial act of the clerk in entering satisfaction of the judgment, based entirely upon the sheriff's return, was without legal justification. Indeed, the complaint seems to have been carefully framed so as to avoid alleging as a fact that the judgment therein referred to was satisfied by a levy upon and sale of sufficient property under execution to pay the same, or that the money to fully satisfy it was paid to the sheriff holding the execution; and that thereupon the sheriff returned the execution with the statement that the same was satisfied in one or the other of these ways. In short, the complaint in this respect, fails to state the ultimate fact that the judgment rendered against the plaintiff and the defendants Andrews and Davis, upon the injunction bonds executed by them, has been paid.

Judgment affirmed.

(156 Fed. 433.)

CHARLTON et al. v. KELLY.

(Circuit Court of Appeals, Ninth Circuit. October 22, 1907.)

No. 1,445.

1. MINES AND MINERALS—MINING CLAIMS—MARKING OF BOUNDARIES.

Under Rev. St. § 2324 [U. S. Comp. St. 1901, p. 1426], which requires that a mining location "must be distinctly marked on the ground so that its boundaries can be readily traced," no particular method of marking is required, and what is sufficient may depend on the topography of the ground; it being a question of fact in each case whether the lines are so marked that they can be readily traced by a person making a reasonable effort to do so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, §§ 40-44.]

2. SAME—DISCOVERY OF MINERAL.

An instruction that, to constitute a discovery of gold sufficient to support a location of a gold placer mining claim as against an adverse mineral locator, the gold found must be of such character and quantity and found under such circumstances as to justify a man of ordinary prudence in the expenditure of time and money in the development of the property, is not erroneous; the word "development," as so used, being the equivalent of "exploration."

[Ed. Note.—Sufficiency of discovery of mineral characteristics to support mining location, see note to *Lange v. Robinson*, 79 C. C. A. 6.]

3. SAME—ACTION TO RECOVER CLAIM—INSTRUCTIONS.

Instructions given in an action to recover possession of a mining claim, relating to the questions of discovery of mineral and possession, considered, and *held* not erroneous as applied to the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 109.]

4. TRIAL—INSTRUCTING JURY—DISCRETION OF COURT.

A court has a wide discretion in the matter of charging the jury, and may bring the jury in at any time and give them additional instructions, whether requested or not; and where they ask for additional instructions on a particular question it is not error for the court also to further instruct them on other issues.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 744, 745.]

5. WITNESSES—IMPEACHMENT—USE OF DEPOSITION TAKEN IN ANOTHER CAUSE.

Statements made by a witness in a deposition taken in another action, contradictory of his testimony given in the cause on trial, may be read in such cause for the purpose of impeachment, regardless of their relevancy to the issues on trial; and in such case the party introducing them is not required to read the entire deposition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1255.]

6. NEW TRIAL—GROUNDS—MISCONDUCT OF OFFICER AFFECTING JURY.

If an officer of the court, whether he has charge of the jury or not, makes to the jury during their deliberations statements calculated to influence their verdict, it is ground for a new trial; but if, under all the circumstances, it does not appear that the conduct of the officer had the effect of influencing the verdict, a new trial will not be granted on that ground.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 100.]

In Error to the District Court of the United States for the Third Division of the Territory of Alaska.

The plaintiffs in error brought ejectment to recover possession of a certain mining claim in the Fairbanks recording district, Alaska, known as "Upper No. 6 Below Discovery," in the second tier of bench claims on the right limit of Dome creek, alleging a location made on August 11, 1904, on a discovery of gold made on the day previous; the location having been completed by the recording of two location notices, one on September 29, 1904, and an amended location certificate on May 31, 1906. The defendant in error claimed under a location made on June 26, 1905, of a claim known as "No. 6 Below Discovery," third tier of benches, the lower half of which claim overlaps the location of the plaintiffs in error. It was claimed by the plaintiffs in error that up to the time of the location of the Kelly claim they had been in the actual possession of their claim through one Kelsey, their agent, who was obliged to leave the claim on June 26, 1905, the day of the Kelly location, in order to obtain provisions, and was detained in Fairbanks as a member of a jury until the following September, when he returned to the claim. The evidence was that the ground on which these claims were located was covered with a heavy growth of moss, from one to three or four feet thick, and with timber and brush. It was contended by the defendant in error that the plaintiffs in error never did make a valid location of their claim, for the reasons, first, that no discovery of mineral was made thereon, sufficient to comply with the statute; and, second, that the boundaries of the claim were not marked so that they could be readily traced on the ground, and that no proper certificate of location was recorded before the rights of the defendant in error vested. After the case had been submitted to the jury, and they had been in deliberation about 20 hours, they notified the bailiff in charge that they could not come to an agreement and requested him to notify the judge. The bailiff communicated this request to the marshal. The marshal went to the jury room and spoke to the jury of their inability to agree, and suggested that they get further instructions from the judge. There is evidence from affidavits of the jurors that the marshal remarked to the jury that the case was an important one, that it was on trial for a second time, and that they ought to be able to agree. The jury at that time stood evenly divided. They were thereafter brought into court and further instructed, and again retired and agreed upon a verdict for the defendant in error. The remarks of the marshal to the jury were set forth in affidavits and were presented to the court on a motion for a new trial. The motion was overruled, and judgment entered for the defendant in error.

West & De Journal, Jeremiah Cousby, Heilig & Tozier, and T. C. West, for plaintiffs in error.

McGinn & Sullivan, J. C. Campbell, W. H. Metson, Frank C. Drew, C. F. Oatman, and J. R. Mackenzie, for defendant in error.

Before GILBERT, Circuit Judge, and DE HAVEN and HUNT, District Judges.

GILBERT, Circuit Judge (after stating the facts as above). Error is assigned to the instruction of the court to the jury on the subject of the marking of the plaintiff in error's claim. It is said that the substance of the instruction was that it is necessary that a mining claim be marked upon the ground by stakes or other permanent monuments; whereas, the law is that the statute is sufficiently complied with if there is such marking on the ground by stakes, monuments, mounds, and written notices, or otherwise, that the boundaries of the location can be readily traced. The instruction of the court upon this branch of the case was that it depended somewhat upon the conformation of the ground and the surrounding conditions whether the boundaries were so marked as to comply with the law, and said:

"You are instructed that a claim may be marked upon the ground by stakes or other permanent monuments, but you are instructed that the law requires

a claim to be so distinctly marked upon the ground that its boundaries can be readily traced. The requirements of the statute in this respect are not necessarily fulfilled by merely setting stakes at each of the corners of the claim and at the center of the end lines, unless the topography of the ground and the surrounding conditions are such that a person accustomed to tracing lines of mining claims can, after reading a description of the claim in the posted or recorded notice of location or upon the stakes, by a reasonable and bona fide effort to do so, find all of the stakes and thereby readily trace the boundaries. Where the country is broken, or the view from one stake or monument to another is obstructed by intervening timber or brush, it may be necessary to blaze trees along the line, or cut away the brush, or set more stakes at such distances that they may be seen from one to the other, in a way to indicate the lines so that the boundaries can be readily traced. But it is not for the court to say what is a sufficient marking of the boundaries. It is your duty to determine, from all the evidence in the case and from the topography of the ground in question, whether or not a sufficient marking of the boundaries of the claim by the plaintiffs was made so that the same could be readily traced by a person making a reasonable effort to do so. If you find from the evidence in this case that this location was so definitely marked on the ground by the plaintiffs or their agents that its boundaries could be readily traced, then I instruct you that the plaintiffs have complied with this requirement of the law. If not, then I instruct you that they have failed in one of the essentials of a valid placer mining location, and that your verdict must be for the defendant."

We find no error in this instruction. The statute requires that the location must be marked on the ground so that its boundaries can be readily traced. It does not prescribe or define the nature of the marks or the position of the same on the ground. It is universally held that any marking on the ground whereby the boundaries of the claim may be readily traced is sufficient. The instruction so given by the court below recognized this rule. It did not confine the jury to the consideration of stakes or other permanent monuments on the ground, and it left to the jury the decision of the question whether, from the evidence in the case and the topography of the ground, a sufficient marking of the boundaries of the claim had been made by the plaintiffs in error so that the same could be readily traced by a person making a reasonable effort to do so. *North Noonday Mining Co. v. Orient Mining Co.* (C. C.) 1 Fed. 522; 6 Sawy. 299; *Book v. Justice Min. Co.* (C. C.) 58 Fed. 106, 113, and cases there cited.

It is contended that the court gave erroneous instruction on the subject of the discovery necessary to the location of a placer claim. The general objection is made that the charge was argumentative, comprising the recital of opinions of text-writers and misleading extracts from decided cases. The charge upon this branch of the case was comprehensive and exhaustive. It contained the recital of the language of decisions of the Supreme Court of the United States and of the state of California, none of which, so far as we can discover, was inappropriate to the case. But it is said that the portion of the charge relating to the insufficiency of mere indications of mineral to constitute a discovery was erroneous and misleading. Upon that subject the court said that slight surface indications did not constitute a discovery, and quoted the language of the Supreme Court of California in *Miller v. Chrisman*, 140 Cal. 449, 73 Pac. 1084, in which it was said:

"To constitute a discovery, the law requires something more than conjecture, hope, or even indications."

The court further said:

"If you shall find and believe from the evidence in this case that Klonos, Kelsey, and Schmidt found the colors and the particles of gold so testified to by them in the draw or small water course on the surface of the ground in dispute, then you should determine whether or not such finding was of sufficient character and found in such places, and under such conditions as to constitute such a discovery of mineral as will satisfy the law. You are instructed that mere indications, however strong, are not sufficient to answer the requirements of the statute."

The court proceeded to say that the statute should, as between conflicting claimants to mineral lands, receive a broad and liberal construction, so as to protect bona fide locators who had really made a discovery of mineral. We find nothing in these instructions as to the law relating to discovery that is not in harmony with the decisions of the Supreme Court of the United States or with the decision of this court in *Lange v. Robinson*, 148 Fed. 799, 79 C. C. A. 1, which is relied upon by the plaintiffs in error. In that case we said:

"The question must be decided, not only with reference to the gold actually found within the limits of the claim located, but also in view of its situation with reference to other lands known to contain valuable deposits of placer gold, and whether its rock and soil formations are such as are usually found where these deposits exist in paying quantities."

And we held that, to constitute a discovery sufficient to support the location of a gold placer claim as against another mineral claimant, it is not necessary that gold must have been found thereon in paying quantities, but that there must have been such a discovery of gold as to give reasonable evidence that the ground is valuable for placer mining, taking into consideration its character, location and surroundings.

The principal objection made to the charge on this branch of the case is that the court instructed the jury that the mineral discovered must, in order to constitute a discovery, be of such quantity and character and found under such circumstances as to justify a man of ordinary prudence in the expenditure of his time and money in the development of the property. It is argued that a discovery sufficient to justify the expenditure of time and money in the development of a mining claim must necessarily be greater than that which is necessary to justify the expenditure of money for the purpose of exploration, with the reasonable expectation that, when developed, the claim will be found valuable as a placer mining claim. Counsel for the plaintiffs in error have assumed for the word "development" a broader meaning than was intended in the charge. The court did not mean that, in order to comply with the law, there must be such a discovery as to justify the expenditure of time and money upon a claim to the extent of opening up the whole thereof and acquiring an exhaustive knowledge concerning its resources. The word as it was used by the court, and as in connection with the whole charge it must have been understood by the jury, was equivalent to the word "exploration," and was used in the sense in which it was employed in *Chrisman v. Miller*, 197 U. S. 313, 323, 25 Sup. Ct. 468, 470, 49 L. Ed. 770, in which the court thus quoted with approval the language of Mr. Justice Field in a prior case:

"The mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. The mineral must exist in such quantities as to

justify the expenditure of money for the development of the mine and the extraction of the mineral."

Error is assigned to the instruction on the subject of possession. The court instructed the jury that they should view the matter of the absence of a prior occupant and the character of his actual occupancy and possession with care and caution. This it is said is erroneous, because it is an invasion of the province of the jury, prohibited by section 673 of the Alaskan Code. In answer to this it is sufficient to say that the instruction but expressed a rule of law, not a comment on the testimony in the particular case, nor an expression of opinion as to the credibility of witnesses or the weight of the evidence. It is contended that the charge was erroneous, also, in that the court instructed the jury that if they should find from the evidence that the plaintiffs in error were not in the actual possession of the premises in good faith, and had not temporarily left the same in good faith, but were merely holding the same for speculative purposes and without any discovery of mineral thereon, their verdict should be against the plaintiffs in error on that question. There was evidence in the case from which the jury might have drawn the inference that the claim had been staked by the plaintiffs in error without appropriate discovery and for merely speculative purposes. In view of that evidence, there was no error in the charge as given.

The further point is made that the instruction was erroneous, in that it charged the jury that the affirmative matter in the defendant's answer was not denied by the reply. This objection is too trivial to require extended comment. The complaint had alleged that the defendants wrongfully entered upon the property in dispute on or about July 1, 1905, and from that date had wrongfully withheld the same from the plaintiffs in error. The answer alleged that the defendants in the action had the actual possession of the property from and after July 1, 1905. After alleging that the defendant in error was in the actual possession, the plaintiffs in error could not, in their reply, deny the affirmative answer alleging the same fact, nor can the language of their reply be so construed.

Upon the request of the jury for further instructions in answer to their question whether the placing of tools and cooking utensils on a mining claim constitute possession, when the owner is away after supplies and provisions, the court said:

"Merely placing a tent and a few tools and a small supply of provisions upon a placer mining claim do not alone and of themselves constitute actual possession."

It is contended that this was error, for the reason that the court did not thereby fully answer the jury's question. But, upon the question of the relation which the absence of the owner from the claim while seeking supplies or provisions bears to the question of his possession, the court in the original charge had instructed the jury that where a prospector has in good faith temporarily gone away from his claim for the purpose of purchasing provisions or supplies, or for any other temporary purpose, intending to return and resume his actual occupation, possession, and labors, such temporary absence is not to be construed

to be an abandonment of his rights to the ground, and that one entering the ground during such temporary absence could not initiate any right thereto. But it is said that the court proceeded to give instructions not requested by the jury, and that this was error. There can be no question that the court may exercise a wide discretion in the matter of charging the jury, and may bring the jury in at any time and give them additional instructions whether requested or not. *Allis v. United States*, 155 U. S. 117, 15 Sup. Ct. 36, 39 L. Ed. 91; *Nichols v. Munsel et ux.*, 115 Mass. 567.

It is contended that the court erred in admitting in evidence a portion of a deposition of one of the plaintiffs in error, taken in another cause, in regard to discovery of gold upon the surface of claim No. 4 Below Discovery. It is said that the admission of this deposition was erroneous, for the reason that it was a deposition taken in another cause, and therefore not admissible in the case on trial. This objection leaves out of view the purpose for which the deposition was offered and admitted in evidence. It was not offered to prove any of the substantive issues of the case, but to impeach the testimony of the witness by showing that at another time and place he had made statements under oath inconsistent with those made upon the witness stand in the case on trial. For the purpose of impeachment a deposition is to be regarded as any other statement or declaration of the witness, and it is not necessary that the whole of the deposition be read, or any greater portion thereof than that which directly relates to the proposed impeachment.

It is urged that the communication made by the marshal to the jury while they were deliberating upon their verdict was such fatal irregularity as to require the reversal of the judgment. The facts on which this contention is based were presented to the court below by affidavits upon the motion for a new trial. Ordinarily the granting or withholding a new trial rests in the sound discretion of the trial court, and the ruling on such a motion is not assignable as error. In the present case there was clearly no abuse of discretion. If an officer of the court, whether he has charge of the jury or not, makes to the jury during their deliberations statements calculated to influence their verdict, it is ground for a new trial. *Clyde Mattox v. United States*, 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917; *State v. La Grange*, 99 Iowa, 10, 68 N. W. 557; *State v. Dallas*, 35 La. Ann. 899; *Barnett v. Eaton*, 62 Miss. 768. But if, under all the circumstances, it does not appear that the conduct of the officer had the effect of influencing the verdict, a new trial will not be ordered upon that ground. *United States v. Reid et al.*, 12 How. 361, 13 L. Ed. 1023; *Leach v. Wilbur*, 9 Allen (Mass.) 212; *State v. Wart*, 51 Iowa, 587, 2 N. W. 405; *Nelling v. Industrial Mfg. Co.*, 78 Ga. 260. The affidavits concerning the nature of the remarks of the marshal to the jury are to some extent contradictory. Conceding the facts to have been as presented most strongly for the plaintiffs in error, they are that the marshal said:

"What is the matter with you that you can't agree in this case? This is a very important case, and this is the second time it has been tried. You ought to be able to come to some agreement some way. You had better call up the judge and get some more instructions."

There is nothing in the affidavits to show that any of the jurors was influenced by these remarks, and there is nothing in the language shown calculated to influence the jury for one or the other of the parties. While such remarks by an officer of the court to a jury are prohibited by law, and should be discountenanced, they are not necessarily ground for a new trial, and they are certainly not ground for the reversal of a judgment in an appellate court after the trial court has passed upon their force and effect on a motion for a new trial.

There are other assignments of error in the record, but in none of them do we find error for which the judgment should be reversed.

The judgment is affirmed.

(156 Fed. 439.)

HOLMGREN v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 14, 1907.)

No. 1,382.

1. CRIMINAL LAW—REVIEW ON WRIT OF ERROR—ASSIGNMENTS OF ERROR.

An assignment of error in a criminal case, based upon the fact that the jury were permitted to take with them to their room the indictment, on which was indorsed the verdict of the jury on a former trial finding the defendant guilty, cannot be considered by the appellate court, where the matter was not brought to the attention of the trial court until after the verdict was returned.

2. SAME—MATTERS REVIEWABLE—RULING ON MOTION FOR NEW TRIAL.

A judgment of conviction in a criminal case will not be reversed by an appellate court because of the overruling of a motion for a new trial based upon the ground that the jury took to their room the indictment, on which was recorded a former conviction of defendant, where such motion and the supporting affidavits were considered and passed upon by the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3071.]

3. SAME—EVIDENCE—ACCOMPLICES WITHIN RULES OF EVIDENCE.

On the trial of a defendant charged with perjury in giving false testimony in a proceeding for naturalization of an alien, the applicant for citizenship is not an accomplice in such sense as to require the jury to be cautioned in respect to his testimony, where it does not appear that defendant gave the false testimony at the instigation of such applicant.

4. PERJURY—ELEMENTS OF OFFENSE—FEDERAL STATUTE.

On the trial of a defendant charged with a violation of Rev. St. § 5395 [U. S. Comp. St. 1901, p. 3654], which denounces a penalty against one who "knowingly swears falsely" in making any oath under any law relating to naturalization, it is sufficient to warrant conviction if defendant knowingly and willfully testified falsely, and it is not necessary that his act should also have been corrupt or malicious.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, § 1.]

5. SAME—INSTRUCTIONS.

Instructions on the trial of a defendant charged with perjury in naturalization proceedings, under Rev. St. § 5395 [U. S. Comp. St. 1901, p. 3654], considered and approved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, §§ 134-138.]

6. CRIMINAL LAW—FALSE SWEARING IN NATURALIZATION PROCEEDING—JURISDICTION OF OFFENSE.

A District Court of the United States has jurisdiction of a prosecution under Rev. St. § 5395 [U. S. Comp. St. 1901, p. 3654], for false swearing in a naturalization proceeding, notwithstanding the fact that such proceeding was in a state court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 170.]

In Error to the District Court of the United States for the Northern District of California.

Marshall B. Woodworth, for plaintiff in error.

Robert T. Devlin, U. S. Atty., Benjamin L. McKinley, Asst. U. S. Atty., and Frank A. Duryea, Special Asst. U. S. Atty.

Before GILBERT and ROSS, Circuit Judges, and HUNT, District Judge.

GILBERT, Circuit Judge. The plaintiff in error was indicted for violation of section 5395 of the Revised Statutes [U. S. Comp. St. 1901, p. 3654]. The indictment contained three counts; each count charging the plaintiff in error with the commission of perjury when testifying as a witness in three separate naturalization proceedings. He had two trials in the court below. On the first trial he was acquitted on counts 1 and 2, and convicted on count 3. The perjury of which he was convicted on the third count consisted in swearing that he had known in the United States the applicant for citizenship for five years prior to the application; whereas, as alleged in the indictment, he had not known him for more than four years prior to said application. He was granted a new trial, and on the second trial he was convicted under the third count and recommended to the mercy of the court. A motion for a new trial was made and denied. A motion in arrest of judgment was also denied.

One of the errors principally relied upon is that the District Court permitted the jury to take with them, and keep during all of their deliberations in the jury room, the indictment, upon which was indorsed the verdict of the jury on the previous trial, finding the plaintiff in error guilty on the third count of the indictment. This assignment of error cannot avail the plaintiff in error, for the reason that the matter was not brought to the attention of the court at any time until after a verdict was returned; the submission of the indictment with the indorsement thereon to the jury having been an accident for which counsel for plaintiff in error was as much accountable as was any one. Said the Court of Appeals for the Eighth Circuit, in *St. Louis S. W. Ry. v. Henson*, 58 Fed. 531, 7 C. C. A. 349:

"It is the province of an appellate court to review the rulings of the trial court on questions actually brought to the attention of the court and decided by it."

And in *Manufacturing Co. v. Joyce*, 54 Fed. 332, 4 C. C. A. 368, it was said:

"The rule is well established that the appellate court will only permit those matters to be assigned for error that were brought to the attention of the court below during the progress of the trial and then passed upon."

In *Railway Co. v. Heck*, 102 U. S. 120, 26 L. Ed. 58, Chief Justice Waite said:

"Our power is confined to exceptions actually taken at the trial. The theory of a bill of exceptions is that it states what occurred when the trial was going on."

But it is said that the alleged misconduct of the court and its officers, in submitting to the jury the indictment with the indorsement of the former verdict thereon, is ground for reversal in this court under another assignment of error, which is that the trial court denied the motion of plaintiff in error for a new trial. It is shown in the record by affidavits in support of the motion for a new trial that the indictment was delivered by a bailiff to the jury when they retired to consider their verdict, and that there was indorsed thereon:

"Tried April 5-6-7, 1906. Verdict, not guilty on the first and second counts of indictment, and guilty on the third count of the indictment. April 13, 1906. New trial granted."

The attorney for the plaintiff in error stated in his affidavit that he had no knowledge that the indictment had been handed to the jury, and that, when he saw the deputy clerk hand certain papers to the jury before retiring, he thought they were simply forms of verdict for the jury. There was an affidavit of one of the jurors that during the course of the deliberations of the jury the indictment, with the indorsements thereon, was read by the jury, and the affidavit of another juror to the same effect, with the further statement that in his mind the indorsement on the indictment created an unfavorable opinion against the plaintiff in error. This latter portion of the affidavit was not admissible, for the evidence of jurors as to the influences which affected their deliberations is inadmissible either to impeach or support the verdict. *Clyde Mattox v. United States*, 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917.

Whether the submission to the jury of an indictment upon which a former conviction is recorded is error for which a judgment should be reversed is a question upon which the decisions are not harmonious. In *Green v. State*, 38 Ark. 304, the court refused to reverse the judgment on that ground.

In 2 *Thomp. on Trials*, § 2591, it is said:

"It is not enough for counsel to show, in support of a motion for a new trial, that a particular paper was sent to the jury by the adverse party without his knowledge. It is his duty to ascertain what papers are sent to the jury before they leave the court."

In *Forbes v. Commonwealth*, 90 Va. 550, 19 S. E. 164, the Supreme Court of Appeals of Virginia held that it was not error to send to the jury the indictment, whereon is recorded the verdict of "guilty" of a former jury, where no objection is made until after the verdict.

In *State v. Shores*, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875, the court, in refusing to reverse a judgment on that ground, said:

"The jury had seen the indictment with the indorsement, before any motion was made with reference thereto. Every member of the jury may have been in court and heard the verdict read against Hall, and still that would not have disqualified them as jurors."

In *Cargill v. Commonwealth*, 93 Ky. 578, 20 S. W. 782, the court said:

"But the appellant made no objection, and it was his business, as well as that of the other side, to see that the proper papers were taken by the jury, and, it not being done, to call the court's attention to it. By proper vigilance upon his part, his rightful objection would have been available to him."

In *State v. Tucker*, 52 Atl. 741, 75 Conn. 201, it was held that the failure to remove the record of the judgment of conviction given to the jury, or to direct them not to regard it, was not prejudicial to the defendant, where no objection was made until after the verdict. The court said:

"It is the duty of counsel, as well as of the court, to ascertain what papers are delivered to the jury."

In *Smalls v. State*, 105 Ga. 669, 31 S. E. 571, the court said:

"If a party desires a verdict rendered at a former trial of the same case concealed from the inspection of the jury, he should present a request to this effect."

In *Sanders v. State*, 131 Ala. 1, 31 South. 564, the court found no error in giving to the jury the indictment, on which was recorded the verdict of a former jury, and so held on the ground that the statute requires that the indictment should be taken by the jury on their retirement to consider their verdict.

In *Hjeronymus v. State* (Tex. Cr. App.) 83 S. W. 708, the statute forbade reference to a former trial and conviction or any allusion to it, but the court held that there was no error in the case under consideration, as it was not made to appear that the jury was aware of the existence of the former verdict until after they had agreed to convict, nor was it shown that the former verdict was used by them in arriving at their verdict.

In *Harvey v. State*, 35 Tex. Cr. R. 535, 34 S. W. 623, the court said:

"In our opinion the weight of the testimony in this regard is to the effect that the jury who tried the case did not notice or read, or attempt to read, the obliterated verdict, and if they had done so, in the absence of some showing of injury to appellant, we could not consider this as fundamental error, or such error as ought to have authorized the court below to grant a new trial."

In *Anschicks v. State*, 6 Tex. App. 524, the court said:

"It was the business of counsel to see to it that the jury were permitted to carry with them such papers as were proper to be used in their retirement."

In *Ogden v. United States*, 112 Fed. 523, 50 C. C. A. 380, however, the Circuit Court of Appeals for the Third Circuit held that the fact that, on the retirement of the jury in a criminal case, an officer of the court handed to them the indictments on which the defendant was tried, which were taken into the jury room with other papers for their consideration, and that indorsed on the back of each indictment was the verdict of a former jury finding the defendant guilty as charged therein, was such a violation of the rights of the defendant as to entitle him to a new trial, and that it was not incumbent upon him to show that such indorsements were actually read by the jurors or any of them. In that case the right of the defendant, against

whom a verdict of guilty had been rendered on the second trial, to move for a new trial and to have that motion considered on the reasons presented for it, had been denied by the trial court. That right was held to be an absolute one, the granting or refusal of which did not rest in the discretion of the court. Therein lies the important and essential difference between that case and the case at bar. In the Ogden Case, the trial court refused to permit the filing of a motion for a new trial, offered in due time, or to consider it or the affidavits offered in its support. The Circuit Court of Appeals said:

"It is not disputed that in the courts of the United States the allowance or refusal of a new trial rests in the sound discretion of the court to which the application is addressed, and that the result cannot be made the subject of review by writ of error. The gravamen of the case, however, made by the plaintiff in error, is that the court below declined to exercise its discretion at all in refusing the motion for a new trial and excluding from its consideration the reasons filed in support thereof."

In the case at bar, the court below entertained the motion for a new trial and considered the affidavits which were filed in its support. The determination of a motion for a new trial involves the exercise of a wide discretion and a knowledge and appreciation of a case which ordinarily can be possessed only by the trial judge. It is for this reason that his ruling on the motion will not be reviewed in an appellate court, and this rule applies as well to a motion for a new trial presented on affidavits showing matters which occurred after the retirement of the jury to consider their verdict, as to other grounds for a new trial. *Kerr v. Clappitt*, 95 U. S. 188, 24 L. Ed. 493; *Board of Commissioners v. Keene Savings Bank*, 47 C. C. A. 464-476, 108 Fed. 505; *Illinois Cent. R. Co. v. Coughlin*, 75 C. C. A. 262, 145 Fed. 37; *Clyde Mattox v. United States*, 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917.

In the case last cited, the motion for a new trial was based on affidavits showing that communications had been made to the jury by the bailiff, and that certain newspapers had been read by the jury while considering their verdict. The court, while recognizing and affirming the rule that the allowance or refusal of a new trial rests in the sound discretion of the court to which the application is addressed, and cannot be made the subject of review by writ of error, held that the case then under consideration was taken out of the rule, for the reason that the trial court had excluded the affidavits and had refused to exercise any discretion in respect to the matters stated therein.

In *Kerr v. Clappitt*, the court said:

"If the new trial be asked for irregularity in the proceedings of the court, jury, or adverse party, or for abuse of discretion by which either party was prevented from having a fair trial, or for misconduct of the jury, or accident or surprise which ordinary prudence could not have guarded against, or for newly discovered evidence, the application must be made upon affidavits. * * * But whether the application be made upon affidavits, or a statement thus prepared, the rulings thereon, whether of the district court originally, or of the Supreme Court of the territory on appeal, are not subject to review by this tribunal. We have no jurisdiction to revise the action of an inferior court upon the question of granting or refusing a new trial, however meritorious the grounds presented for its consideration or erroneous its decision."

In *Louisville & N. R. Co. v. Sumner*, 125 Fed. 719, 60 C. C. A. 487, the Circuit Court of Appeals for the Sixth Circuit said:

"It has often been said by this court that it will not review the action of the lower court in its disposition of a motion for a new trial or other matters addressed to its discretion, but we have held that for a refusal to exercise its discretion on a motion of which it should take cognizance a writ of error will lie."

In view of these authorities and the nature of the facts which were so presented in the affidavits on the motion for a new trial in the present case, we cannot see that the ruling of the court below in denying the new trial, in the exercise of the discretion which was vested in that court, is subject to review in this.

It is assigned as error that the court failed to warn the jury of the danger in convicting a defendant on the testimony of an accomplice. This assignment is based upon the theory that Frank Werta, the applicant for citizenship, was an accomplice with the plaintiff in error, who made the false oath. An accomplice is "one who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of a crime." *People v. Bolanger*, 71 Cal. 19, 11 Pac. 799; *State v. Roberts*, 15 Or. 197, 13 Pac. 896. To render one an accomplice, "he must in some manner aid or assist or participate in the criminal act, and by that connection he becomes equally involved in guilt with the other party by reason of the criminal transaction." *People v. Smith*, 28 Hun (N. Y.) 626. Mere knowledge on the part of a witness that the defendant purposes to commit a crime, or does commit a crime, does not render the witness an accomplice. There is nothing in the evidence in the bill of exceptions to show that Frank Werta was an accomplice within these generally accepted definitions. There is no evidence that he solicited the plaintiff in error to make the oath concerning his residence in the United States, or suggested the facts which were sworn to or assisted him in or incited him to the commission of the offense. On the other hand, the evidence conveys the impression that the affidavits as to the time of Werta's residence in the United States were furnished not at his own, but at the instigation of others. Under the circumstances, we think it would have been error to caution the jury on the theory that Werta's testimony was that of an accomplice.

It is said that the court erred in failing to charge the jury that the perjury must be corrupt and malicious, as well as knowing and willful. Section 5395 of the Revised Statutes [U. S. Comp. St. 1901, p. 3654], under which the plaintiff in error was indicted, denounces a penalty against one "who knowingly swears falsely in making any oath under any law relating to naturalization." The court in charging the jury instructed them that they must be satisfied beyond all reasonable doubt, not only that the testimony alleged to be given was false, but that it was willfully and knowingly false, "that he willfully and knowingly testified falsely." This was clearly sufficient. It was not necessary, in order to commit the offense defined in the statute, that there should have been any purpose of gain or any instigation of malice. In *United States v. Edwards* (C. C.) 43 Fed. 67, it was held that an indictment under the statute must allege that the false oath was taken willfully,

and that an allegation that it was corruptly taken does not embrace the element of willfulness.

Error is assigned to the refusal of the court to instruct the jury that they could not convict the defendant upon mere suspicion, however strong, but only upon evidence establishing his guilt to a moral certainty and beyond a reasonable doubt. The instruction so requested would have been proper, but the court was not bound to adopt it in the precise form in which it was presented, and there was no error in refusing it, in view of the fact that the court properly instructed the jury that the defendant was presumed to be innocent, that they would not be justified in returning a verdict of guilty unless they were satisfied to a moral certainty and after a consideration of all the evidence that he was guilty, and said:

"You are further charged that you cannot convict the defendant upon his statements, admissions, or actions alone. Independently of his statements or actions, there must be other evidence tending to show that the crime has been committed."

And further said that it was incumbent upon the government to prove the guilt of the defendant beyond a reasonable doubt and by the testimony of two witnesses, or by the testimony of one witness and corroborating circumstances with reference to each assignment of perjury.

It is contended that the court erred in refusing to instruct the jury as follows:

"Where a person who is a mariner comes to the United States, and afterwards follows his business as a mariner, if he has the intention of becoming a citizen of the United States, his abode on American vessels would constitute a residence in the United States."

The difficulty in the way of giving this instruction was that there was no testimony which warranted it. There is nothing in the evidence to show that Werta was serving upon American vessels prior to March, 1901. It is true that he had come to the United States in 1899 as a member of the crew of a Finnish ship, upon which ship he had signed articles for a round trip voyage to return to London; that while on said ship he remained at Mobile, Ala., about three months; and that thereafter he sailed away to Buenos Ayres on the same ship. His remaining for that period of time in the United States on a foreign vessel without having formed the intention to remain in the United States constituted no residence in the United States. The instruction was properly refused.

It is assigned as error that the court sustained the objection of the district attorney to the introduction in evidence of a document purporting to be the application and affidavit of Frank Werta to the local board of inspectors, which was offered for the purpose of impeaching Werta's testimony. The court ruled that the affidavit did not contradict the testimony of the witness. We cannot say that there was error in the ruling, for the affidavit is not embodied in the bill of exceptions.

It is contended that the court erred in overruling the demurrer of the plaintiff in error and his motion in arrest of judgment, on the ground that the court was without jurisdiction, since the alleged of-

fense was committed in naturalization proceedings in a state court. We held otherwise in *Schmidt v. United States*, 133 Fed. 257, 66 C. C. A. 389.

The judgment is affirmed.

(156 Fed. 448.)

**BUNKER HILL & SULLIVAN MINING & CONCENTRATING CO. v.
SAFFORD.**

(Circuit Court of Appeals, Ninth Circuit. October 14, 1907.)

No. 1,307.

MINES AND MINERALS—LEASES—ACTION FOR BREACH—SUFFICIENCY OF EVIDENCE.

A judgment in favor of the lessees of certain mine dumps, which they were to work over for mineral on a royalty basis, against the lessor, for an alleged violation of the lease in excluding plaintiffs from the property, *held* not supported by the evidence, a preponderance of which showed that the work had been abandoned by the lessees because they found it unprofitable.

In Error to the Circuit Court of the United States for the Northern Division of the District of Idaho.

Miron A. Folsom, for plaintiff in error.

John P. Gray, Albert Allen, and J. H. Forney, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The defendant in error was plaintiff in the court below. The complaint upon which the action was there tried, after setting out the ownership and operation by the defendant company of certain described mining claims near the town of Wardner, in the county of Shoshone, Idaho, together with large banks or dumps of mine waste rock from its said mines, that had accumulated at and near the mouths of the various tunnels entering the mines, and near its works and mills, alleged that in the year 1903 the defendant entered into an agreement by which it leased to the plaintiff and one J. B. Mackenzie all of its dumps of mine waste rock situated near its said mines in Shoshone county by an instrument in writing which is set out at large in the complaint, from which instrument it appears that the lessor company, for and in consideration of the royalties, covenants, and agreements in the lease reserved, and to be kept and performed by the lessees, leased the dumps to them for a term expiring at noon on the 1st day of October, 1907, unless sooner forfeited through the violation of any of the covenants of the lease. In consideration of the demise, the lessees covenanted and agreed with the lessor as follows:

"(1) To enter upon said dumps or banks to work the same so as to take out the greatest possible amount of lead and silver. (2) To work said dumps steadily and continuously as the weather and supply of water for washing will permit, from the date of this lease, with at least five men and with as much of said water as can be obtained and used. Cessation to work for the total number of twenty days of any calendar month shall be considered a violation of these covenants, but no work shall be required while the dumps are frozen. (3) To take care of the dumps after they have been worked, so as to

prevent their accumulating upon any ground of the lessor not intended for such waste, and to prevent the same from accumulating in such a way that they will be washed into Mile (Milo) creek, or the South Fork of the Couer d' Alene river, or upon the property of any person or corporation whatever. (4) To allow said lessor and its officers and agents from time to time to enter upon and into all parts of said banks or dumps for the purpose of inspection. (5) To not assign this lease, or any interest thereunder, and to not sublet the said premises or any part thereof, without the written assent of said lessor, and to not allow any person not in privity with the parties hereto to take or hold possession of said premises, or any part thereof, under any pretense whatever. (6) To pay as royalty to the lessor 10 per cent. of the gross value of the product, less freight and treatment and other smelting charges; the lessor to ship and sell all of the product and pay the lessees the return from the same, less the royalty due lessor, and any other charges there may be against the lessees growing out of the lease. (7) To put up a bond signed by bondsmen satisfactory to the lessor (or in lieu thereof a cash bond), in the sum of five thousand dollars (\$5,000.00), within ten days from date, sufficient in form to protect the lessor from any damage which the lessees may do to the property of the lessor, or to the property of any other person, and to protect the lessor against any loss or damage whatever by reason of any act of the lessees, and to protect the lessor against liens for labor or supplies. (8) To conduct the workings of all the said dumps as desired by the lessor, in so far as the said work or operations may interfere with the operations of the lessor of its property, such interference to be decided by the manager only. (9) To deliver to said lessor the said premises, with the appurtenances, in good order and condition, without demand or notice on said 1st day of October, or at any time previous upon demand for forfeiture, or upon demand if the continuance of operations by the lessees would interfere with the work of the lessor, or would require the use of water needed by the lessor, or where the continued working by the lessees would require the territory needed by the lessor."

The complaint further alleged that within 10 days after entering into the agreement the plaintiff and Mackenzie executed to the mining company the bond mentioned, and entered upon the performance of their part of the contract, and selected, with the consent and approval of the defendant company, the place where the working of the dumps should begin, and, in order that such working should not in any manner interfere with the work of the defendant company, constructed, at considerable expense, a tramway, the defendant company furnishing the material therefor, such tramway being constructed for the purpose and use of the defendant company, so that it could deposit the ores being mined by the defendant in such a place that the working by the plaintiff and Mackenzie would not interfere with the defendant's work, after which the plaintiff and Mackenzie forthwith constructed at one of the dumps a plant, consisting of flumes, jigs, and other appliances for the concentration and separation of the ores contained therein from the waste rock, and also constructed a platform across Milo Gulch, to prevent the waste from their works from filling up or interfering with that stream, and thereupon commenced the contemplated operations, carrying the work on with more than five men, and continued in such work, in accordance with the terms and conditions of the lease, until on or about June 8, 1903, at which time the lessees were compelled to suspend their work on account of a temporary lack of water in Milo Gulch; that, during the time the lessees so operated, they extracted and delivered to the defendant company, to be shipped and smelted, and in accordance with the terms of the contract, 50,660 pounds of concen-

trates containing silver and lead, of the value, less freight and treatment and other charges, of \$642.44, which sum of money was received therefor by the defendant, and was divided between the respective parties in accordance with the terms of the contract; that on or about July 25, 1903, and while the plant of the lessees was shut down by reason of the temporary lack of water to operate it, and during the absence of the lessees, the defendant company, contriving to injure the lessees, and without their knowledge or consent, and in violation of the provisions of the lease, wrongfully deposited large quantities of rock in such position that it would roll down and destroy the works of the lessees, and that they were so destroyed, and at the same time, without notice or demand, wrongfully took possession of the dumps, and has ever since excluded the lessees therefrom, resulting in damage to the lessees in the sum of \$100,000; that subsequently, and prior to the commencement of the action, Mackenzie, for a valuable consideration, sold and assigned to plaintiff all of his right, title, interest, and claim under the lease, together with all of his interest in and to said dumps, jigs, flumes, tools, and other property belonging to the plaintiff and the said Mackenzie.

The defendant in its answer admitted the making of the lease, but put in issue the other material allegations of the complaint, and further answered, and alleged, among other things, that the plaintiff and Mackenzie took possession under the terms of the contract of all the dumps described in the complaint, and constructed certain flumes, jigs, etc., for the purpose of working the dumps; that among others was a dump known as the "Stemwinder dump," the works erected on which did not cost more than \$100; that about June 8, 1903, and after working the dump, the plaintiff and Mackenzie found that they contained such a small amount of lead and silver that they could not be worked with a profit, and because they were unable to pay the laborers employed in the work the said lessees on or about the date mentioned abandoned the work; that such abandonment was not caused by any lack of water, or because the dump was frozen, or from any inclemency of the weather; that the plaintiff and Mackenzie ceased work continuously for a total number of more than 20 days in the month of June, 1903, by reason of which cessation of work they abandoned and forfeited all rights under the lease, and that neither of them ever afterwards attempted to resume work thereunder; that the lessees did not conduct their work as desired by the lessor, but, on the contrary, so as to interfere with the operation by the lessor of its property, and that the manager of the defendant company on or about July 1, 1903, decided that the method of working which had been adopted by the plaintiff and Mackenzie interfered with the operation by the lessor of its said property, and caused the plaintiff and Mackenzie to be notified of such decision; that on or about July 1, 1903, the defendant needed for dumping purposes the use of a certain portion of the Stemwinder dump which had been occupied by the plaintiff and Mackenzie, and that on or about that date, and after the plaintiff and Mackenzie had closed down their said work and abandoned or forfeited the same, the defendant notified them of that fact, and to remove a certain flume and other works from a portion of that dump if they considered the same

of any value, but that, notwithstanding that there was such notice, the plaintiff and Mackenzie failed to remove such property, and that thereafter, and on or about July 25, 1903, the defendant in the course of its mining operations resumed the use of a portion of the Stemwinder dump, as a result of which a portion of one of the flumes was injured to an extent not exceeding \$40, but that such injury was without the fault of the defendant, and after the plaintiff and Mackenzie had been given reasonable opportunity to remove the same; that the said acts of the defendant did not interfere with the working by the plaintiff and Mackenzie of any other of the dumps mentioned in the lease, or any portion of the Stemwinder dump, except such as was needed by the defendant company; "that, notwithstanding the acts of abandonment or forfeiture on the part of said Mackenzie and said plaintiff of said contract, defendant has not at any time excluded, and does not now exclude, the said plaintiff or the said Mackenzie, or either of them, from any portion of any of said dumps except the portion required for dumping purposes as hereinabove specified; but defendant alleges that neither plaintiff nor Mackenzie has ever attempted to resume work thereon. And defendant alleges that it has not removed any portion of said dumps mentioned or described in said contract, but defendant has added to said dumps in the course of its operations."

At the trial the plaintiff waived any and all damages growing out of injury to its flumes and other apparatus, claiming only damages for loss of prospective profits, and at the conclusion of the plaintiff's case the defendant moved the court for a direction to the jury to return a verdict in its favor on the grounds that the evidence was too uncertain and speculative for a basis for any verdict, that the lease was terminated by notice given by the manager of the defendant company of the interference by the work of the lessees with the mining operations of the lessor, and that the undisputed evidence showed breaches of the covenants of the lease, in that the lessees abandoned the said work and also violated those clauses of the lease prohibiting the assignment thereof, or any interest therein, and against the subletting of any part thereof.

In denying the motion so made by the defendant, as well as in its instructions to the jury, and in its subsequent order overruling the defendant's motion for a new trial, the court below expressed grave doubts as to the sufficiency of the evidence upon which to rest a verdict for damages for loss of anticipated profits, and in respect to the alleged assignment by one of the lessees to the other of his interest in the lease, and in respect to the alleged subletting, and also in respect to the alleged termination of the lease on the ground of the interference by the lessees' works with the operations of the defendant company. We do not deem it necessary to decide either of those questions, for the reason that a careful consideration of the record satisfies us that the lease and all work thereunder was abandoned by the lessees shortly after the commencement of the work, not because of any lack of water, or because any of the dumps were frozen, or because of any state of the weather, but because of their financial difficulties, and because they found the work unprofitable. We think this plainly appears from the plaintiff's own testimony, taken as a whole, and in connection with

the undisputed fact, shown by the record, that after the lessees suspended all of their work they left that section of the country and leased the dumps to Relling & Williams, who, after working there awhile, also "got tired and quit."

The judgment is reversed, and the case remanded.

(154 Fed. 800.)

THE SANTA ANA.

(Circuit Court of Appeals, Ninth Circuit. June 7, 1907.)

No. 1,367.

1. SHIPPING—GENERAL AVERAGE—EFFECT OF STIPULATIONS OF BILL OF LADING.

While the parties to a shipping contract may by clearly expressed terms either enlarge or limit the carrier's liability in respect to general average, it is the settled rule that stipulations in bills of lading, exempting the carrier from liability for damage or losses arising from certain specified causes, do not affect his liability in general average contribution, although the loss may occur from one or more of the excepted causes.¹

2. SAME—LIABILITY OF VESSEL—FAILURE TO ENFORCE LIEN.

If a master fails to retain the lien which by law he has on the goods of all shippers for their just proportion in a general average contribution, and delivers the goods without requiring payment or a general average bond or other security for the payment thereof, he and the shipowner become personally liable for the full amount of the general average contribution, which all interests should pay to the persons suffering loss.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 624.]

3. SAME—ADJUSTMENT—VALIDITY.

An adjustment in general average, made by an adjuster selected by the vessel, on proofs submitted by all parties, *held* not impeached by the vessel owner for fraud.

4. SAME—SUIT TO ENFORCE AWARD—ISSUES.

Where a libel was filed to enforce a general average award made by an adjuster, and only asked for a readjustment in case objections made to the validity of the award by defendant should be sustained, the libellant cannot complain that a readjustment was not made, where such objections were overruled, and the award made by the adjuster accepted.

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington.

In June, 1900, while the steamer Santa Ana was on a voyage from Seattle to Nome with passengers and a general cargo of merchandise, fire broke out in the cargo, and for the general safety it became necessary to pour water and inject steam into the hold to extinguish the fire. After it was extinguished, the hatches were removed, and a portion of the cargo which had been totally damaged was cast overboard. The vessel then proceeded to her destination at Nome, Alaska, where her cargo was discharged. Much of it was found to be damaged by fire, smoke, and steam. A large proportion of the cargo was the property of the appellee, and it consisted of lumber, furniture, bedding, groceries, wines, liquors, cigars, dry goods, gambling appliances, stage scenery, etc., all for the purpose of establishing at Nome a theater and a store and saloon for the sale of wines, liquors, cigars, and gambling appliances. At the time of the arrival of the vessel at Nome, there was no government there, nor any court by which contribution in general average could

¹ See note at end of case.

have been ascertained or adjusted. After the appellee's cargo had been removed to its warehouse, a survey was made of it by one W. W. Gollin, who was a surveyor for the board of marine underwriters of San Francisco. In making the survey, according to his own testimony and that of W. D. Wood, Gollin acted at the instance of and represented the ship. According to the testimony of other witnesses, Gollin claimed to represent the insurance companies in which the appellee's cargo was insured. The survey, as it appears from the evidence, was superficial and incomplete. A certificate was issued to the appellee showing the total damage to its cargo by fire and steam to be the sum of \$3,617.03. On the return of the vessel to San Francisco in October, 1900, the matter was placed in the hands of an average adjuster for adjustment. The adjustment was delayed from various causes and was not completed until December, 1902. In the adjustment the vessel was valued at \$90,000, the freight at \$1,928, and the cargo at \$65,154. The appellee's cargo was valued at \$36,192 at its point of destination. The adjuster, after allowing various credits to the vessel, found and assessed the sum of \$12,907.04 as the net amount which the vessel should contribute and pay to the appellee after deducting his contributory share. The appellee demanded of the owners of the vessel the payment of their contribution so adjusted, but payment was refused, and thereupon the appellee filed its libel praying for a decree that the award of the adjuster be enforced by the decree of the court against the vessel, her tackle, apparel, furniture, etc.

The bills of lading under which the appellee's cargo was consigned contained, among others, the following provisions:

"(a) General average, if any, to be adjusted according to the York-Antwerp rules of 1890.

"(b) It is agreed that no lien shall attach to any of the vessels employed in the performance of this contract for any breach thereof, and such lien is hereby waived.

"(c) It is further stipulated and agreed that in all cases of loss of any portion or the whole of said goods and merchandise, the amount of claims shall be restricted to the cash value of such goods or merchandise at the original port of shipment, and that all claims for either partial or total loss or damage shall be ascertained and adjusted upon the same basis of value.

"(d) In the event that said Seattle & Yukon Transportation Company shall become liable for any injury, damage or loss to said property, it shall receive the benefit of any insurance thereon in favor of the shipper, owner or consignee."

The District Court held that these provisions of the bill of lading had no relation to the question of the liability of the ship in general average, and on exceptions to the answer ruled out all defenses based thereon. Upon the final hearing a decree was entered for the appellee enforcing the adjustment made at San Francisco, whereby general average contribution was awarded to the appellee in the sum of \$12,907.04.

Nathan H. Frank, H. S. Griggs, and Peter & Powell, for appellant.
William H. Brinker, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HUNT, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is contended that by the provisions of the bills of lading the entire question of general average as set forth in the York-Antwerp rules of 1890 is incorporated in and made a part thereof, and that the provisions of the bills of lading which are set forth in the foregoing statement of facts should have been given full force and effect, and should have been held to qualify the liability of the ship in general average. To this it is to be said that, while the parties to a shipping contract may by clearly expressed terms either enlarge or limit the carrier's liability

in respect to general average, it is the settled rule that stipulations in bills of lading exempting the carrier from damages or losses arising from certain specified causes do not affect his liability in general average contribution, although the loss may occur from one or more of the excepted causes so specified.

In *Carver's Carriage by Sea*, § 80, it is said:

"The shipowner's obligation to contribute to general average sacrifices of the cargo, made during the voyage, will continue, notwithstanding general words in the bill of lading which may seem wide enough to exclude that liability. If the liability is not to exist, that must be stipulated in express terms."

In *Crooks v. Allan*, 5 Q. B. D. 38, Lush, L. J., said:

"The office of the bill of lading is to provide for the rights and liabilities of the parties in reference to the contract to carry, and is not concerned with liabilities to contribution in general average, and, unless the contrary appears, the words used must be so construed."

The same was held in *Schmidt v. Royal Mail Steamship Co.*, 45 L. J. Q. B. 646. In *The Roanoke*, 59 Fed. 161, 8 C. C. A. 67, the Circuit Court of Appeals for the Seventh Circuit, following the cases just cited, held that the clause in a bill of lading exempting carriers from liability for any loss or damage arising from fire and wet, and giving him the benefit of the insurance, affected only rights and liabilities incident to the contract of carriage, and that they do not exempt the vessel from a general average claim for damage caused in extinguishing fire. We find no case holding to the contrary of this doctrine, and we find no error in its application by the court below to the provisions of the bills of lading in the present case.

It is contended, further, that, if the adjustment be conceded to be the basis of the appellee's right, the court nevertheless erred in entering a decree against the appellant for the entire amount to be contributed to the appellee, instead of for the ship's individual proportionate contribution. It is well settled, however, that if the master fails to exercise the lien which by law he has on the goods of all shippers for their just proportion in the general average contribution, and delivers the goods without requiring payment or a general average bond or other security for the payment thereof, he and the shipowner become personally responsible for the full amount of the general average contribution, which all interests should pay to the persons aggrieved. *Carver's Carriage by Sea*, § 442; *Dike v. Propeller St. Joseph*, 6 McLean, 573, Fed. Cas. No. 3,908; *Heye v. North German Lloyd*, 33 Fed. 60, 2 L. R. A. 287; *The Allianca* (D. C.) 64 Fed. 871; *Crooks v. Allan*, 5 Q. B. D. 38.

The appellant seeks to excuse itself from liability to contribute the whole amount on the ground that an average bond was impracticable, and that all reasonable efforts were made to adjust the damage by such means as were at hand, and to obtain such security as was practicable. But the record is barren of evidence to sustain this contention. We find nothing in the testimony to show that a general average bond was demanded, or that security could not have been obtained as a condition for the delivery of the goods. The cargo was of considerable value, and it is not to be assumed, in the absence of proof, that the

consignees were unable to furnish security. In order to preserve its lien, it was not necessary for the ship to retain the cargo on board. *Wellman v. Morse*, 76 Fed. 573, 22 C. C. A. 318. It appears from the evidence that the appellant had a warehouse at Nome in which it could have stored the cargo without relinquishing its lien for general contribution.

It is urged that the appellee should be limited to the recovery of \$3,617.03, the amount of its loss as estimated by Mr. Gollin, and it is argued that fraud sufficient to impeach the adjustment is indicated in the fact that the appellee took away its goods without making any protest against that estimate, and soon thereafter presented to the appellant an affidavit showing its damage to be only one-half of the amount subsequently claimed; and, again, two years later, presented a supplemental affidavit increasing its damage to nearly \$20,000. But these facts are not necessarily indicative of fraud. The examination by Gollin was cursory and incomplete. He did not attempt to make an adjustment in general average. The certificate was never accepted by the appellee. The evidence shows that the extent of the appellee's loss was not then known even to the appellee's agent, and was not ascertained or ascertainable until a date considerably later. The facts attending the adjustment and the method pursued in arriving at the award present nothing to discredit the result. After the ship returned from Nome, she went to San Francisco, and there the appellant selected C. W. Gibbs, an adjuster of marine losses, to make an adjustment in general average. The insurance companies to which the appellee had made its proofs of loss presented the proofs to the adjuster. The appellant also submitted proofs. The adjuster called on both parties for additional proofs, which were furnished, and upon such evidence the adjustment was made. We find no error in the conclusion reached by the trial court that the adjustment is not impeachable for fraud.

The appellant further objects to the award so made, in the adjustment at San Francisco, on the ground that the testimony shows that a large portion of the goods that were allowed to participate in the general average were injured by fire and smoke, and that the fire and smoke damage, which is not allowable in general average, was not segregated from the damage from steam and water. In the record which is before us we do not find that the appellant has presented any evidence on which to base this objection. Its only testimony as to damage by fire is that found in the deposition of Gollin. He, in answer to the question whether the appellee's goods showed scorching or other effects of fire, answered: "There was a great deal of damage done by steam. Q. Outside of steam? A. There were signs of scorching there." If any considerable portion of the damage allowed in the adjustment was the direct result of the fire, the appellant had it in its power to prove that fact. The appellee, in consequence of its understanding that the District Court had ruled on exceptions to the answer that the adjustment was not binding upon either party to the suit, took testimony in full and in detail as to the nature, cause, and extent of the injury to its goods, as a basis for a new adjustment which it expected the court to make. The appellant now points to items of fire damage which that testimony discloses, and on that bases its present contention; but an

examination of that evidence leads to the conclusion that the fire damage was proportionately inconsiderable. We have no ground for saying that the adjustment made in San Francisco was based in any degree whatever on damage from that source, and, as the evidence of the damage to the appellee's goods so taken at length and uncontradicted shows a general damage largely in excess of that found by the adjuster, we are justified in assuming that the adjustment was made as it should have been made, on damage from steam and water only, and on a proper consideration of the law and rules applicable to such adjustments.

The appellee, although it has not appealed from the decree, contends that, since the court below held that the adjustment was not binding upon either party, this court should on this trial *de novo*, upon the evidence which is presented, make a proper adjustment of the loss and assess against the appellant its just contributory share, which share, it is urged, is an amount considerably greater than that assessed by the adjuster. We find that on exceptions to appellant's answer to the libel the court below held that the general average adjustment made in San Francisco was not conclusive, but might on the final hearing be impeached on some of the grounds of error of law or fact alleged in the defense. The appellee in its original libel had alleged the adjustment made in San Francisco and prayed for a decree to enforce it. After the court had so ruled on exceptions to the answer, the appellee, with the leave of the court, filed amendments to its libel, in which, while not attacking the adjustment and award, it prayed that if upon the final hearing the court should find the adjustment defective, incorrect, or in any manner insufficient to bind the vessel and all others concerned, the court upon a proper consideration of all the evidence make a proper adjustment. The court, on the final hearing, having failed to find that the adjustment was open to any of the objections presented by the answer, was not required to make a new adjustment at the instance of the appellant. It was not required to make a new adjustment at the instance of the appellee, for the reason that the latter had not in its pleadings repudiated or attacked the adjustment, but, on the contrary, had sued upon it and had prayed for its enforcement, and had asked the court to make a new adjustment only in case the adjustment sued upon was found to be subject to the objections urged against it by the appellant. Under the issues presented by the pleadings, the appellee must be content here, as in the court below, with the adjustment award.

The decree is affirmed, with costs to the appellee.

NOTE.¹

General Average.

I. NATURE OF RIGHT TO CONTRIBUTION.

[a] (U. S. 1897) A tug towing barges from one port to another is not bound up with them into a single maritime adventure, so as to be subject to the

¹ Supplemental to note to *Pacific Mail S. S. Co. v. New York, H. & R. Mtu. Co.*, 20 C. C. A. 357.

law of general average, even though her compensation for the towage is measured by the freight earned by the barges. Therefore the act of the tug in cutting loose from them, and allowing them to go ashore, in order to save herself from a like fate, will not subject her to a general average contribution. 21 Fed. 671 (1884) reversed.—*The J. P. Donaldson*, 167 U. S. 599, 17 Sup. Ct. 951, 42 L. Ed. 292.

II. PERILS AND ACTS WHICH ARE GROUNDS FOR CONTRIBUTION.

[a] (U. S. 1898) Section 3 of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2046]), which provides that if the shipowner exercised due diligence to make the vessel seaworthy, etc., neither the vessel nor her owner shall be responsible for faults or errors in her navigation or management, does not give an owner who has exercised such diligence a right to contribution in general average for sacrifices made to save vessel and cargo, when stranded through negligence of the ship's officers. 82 Fed. 472, affirmed.—*Flint v. Christall*, 171 U. S. 187, 18 Sup. Ct. 831, 43 L. Ed. 130.

[b] (U. S. 1896) Increased damage by smoke, caused by attempts to extinguish fire by turning steam into the hold, is no foundation for a general average claim, where the damage due to the smoke and that due to the steam cannot be distinguished. 70 Fed. 262 (1895) affirmed.—*Reliance Marine Ins. Co. v. New York & C. Mail S. S. Co.*, 77 Fed. 317, 23 C. C. A. 183; *New York & C. Mail S. S. Co. v. Reliance Marine Ins. Co.*, Id.

[c] (U. S. 1897) A steamship bound for New York having discovered a crack in her shaft, the shaft was strengthened by bolts, and she proceeded at reduced speed until 16 miles from Sandy Hook, when the shaft broke, and greatly damaged the machinery. Contribution was claimed on the ground that the risk to the ship was foreseen, and deliberately undertaken in order to save the ship and cargo the great expense of towage. The evidence showed, however, that, while the officers recognized the possibility of a new breakdown and further damage, they confidently believed that it could be avoided. *Held*, that there was no such voluntary sacrifice of the ship to save cargo as was necessary to make a case of general average. 70 Fed. 251 (1895) affirmed.—*Van Den Toorn v. Leeming*, 79 Fed. 107, 24 C. C. A. 461.

[d] (U. S. 1897) A mere deficiency of five or ten tons below the customary coal supply for the contemplated voyage does not make a steamer liable so as to exempt the cargo from a general average charge in respect to damages not attributable to the deficiency.—*Hurlbut v. Turnure*, 81 Fed. 208, 26 C. C. A. 335.

[e] (U. S. 1897) A steamship which fails to take the customary supply of coal for the voyage is chargeable with the expenses of a port of refuge even if, as it turns out, she would have been obliged, because of delays from adverse storms, to seek such port for a further supply, though she had started with the usual quantity. 76 Fed. 587 (1896) affirmed.—*Hurlbut v. Turnure*, 81 Fed. 208, 26 C. C. A. 335.

[f] (U. S. 1897) A steamship bound from Cuba to New York, which took a half day's supply short of the usual amount of coal, and which, after being delayed several days by a storm, was obliged to put into Newport News, after consuming part of the cargo and ship's materials, *held* liable for the port of refuge expenses and for loss of cargo and materials during the time the coal she ought to have taken would have lasted, the remainder of the loss being considered a general average charge.—*Hurlbut v. Turnure*, 81 Fed. 208, 26 C. C. A. 335.

[g] (U. S. 1900) Libelant chartered a steamship by a time charter, and afterwards subchartered her to a third person, by whom she was employed in trade with Cuba. While so employed, she was seized, with her cargo, by the United States as prize, during the war with Spain, but on trial was released. The owner, libelant, and the subcharterer each refused to pay the expense incurred in obtaining her discharge, for which she was detained, but subsequently, at request of the owner, libelant paid a draft drawn by the master for the amount. *Held*, that such expense was a subject for general average, to be apportioned between the ship, cargo, and freight, and that libelant, having neg-

lected to proceed for that purpose until the contributing interests had been separated, could not recover the amount of the draft in a suit in personam against the owner.—*Woods v. Olsen*, 99 Fed. 451, 39 C. C. A. 595.

[h] (U. S. 1900) A ship in good condition, and in every way fit for the proposed voyage, started from Pensacola with a cargo of timber. She drew 23 feet, 6 inches less than her full-laden draft. When she reached the bar 9 miles below Pensacola the water was 24 feet deep. The channel was narrow and tortuous—shaped like the letter "S." A cross-current struck her. She was near the bottom, did not follow the helm, and grounded. Similar accidents often happened at the same place, and were not preventable. *Held*, that the stranding was not caused by negligence of owner or unseaworthiness of ship, so as to relieve the owner of the cargo from liability, under a general average adjustment, for proportion of expenses incurred in getting the vessel afloat.—*Magdala S. S. Co. v. H. Baars Co.*, 101 Fed. 303, 41 C. C. A. 377.

[i] (U. S. 1900) A vessel was stranded in an exposed position at 7 p. m., and the captain engaged two tugs, which unsuccessfully pulled upon the ship until midnight; and the next morning he made a contract, dependent upon success, with a tugboat syndicate, to get the vessel off for \$3,000. Five tugboats then pulled ineffectually at intervals till midnight. The next morning the captain engaged lighters, and the deck load was taken off, and the same day the vessel was pulled from the bar. She was reloaded, and proceeded on her voyage. *Held*, that the employment of tugs and lighters was necessary, and that the expenses incurred by the captain were not unreasonable, so as to relieve the owner of the cargo from liability, under a general average adjustment, for its proportion of the expenses.—*Magdala S. S. Co. v. H. Baars Co.*, 101 Fed. 303, 41 C. C. A. 377.

[j] (U. S. 1904) After a steamer had struck on a rock causing a serious leak forward and danger of her sinking, the master, in preference to running her upon the rocks in the vicinity, took her some distance, and beached her on what he supposed to be a sandy beach. Contrary to his expectation, the bottom was of soft mud, and the bow stuck in the mud and settled until the vessel sank, and the main deck, on which was the cargo, was submerged, and the cargo damaged. Had the bottom been of sand as supposed, so as to lift and sustain the bow, the vessel would probably have remained afloat, or at least with her deck above water. *Held*, that the loss was attributable to the attempted salvage as the proximate cause, and was a subject for general average. Decree (D. C. 1902) 118 Fed. 307, affirmed.—*Norwich & N. Y. Transp. Co. v. Insurance Co. of North America*, 129 Fed. 1006, 64 C. C. A. 610; *Same v. Security Ins. Co., Id.*; *Same v. Firemen's Fund Ins. Co., Id.*; *Same v. Chubb, Id.*

[k] (U. S. 1904) If a maritime loss follows as a natural or inevitable result of the original and involuntary cause of danger, then such original cause should be regarded as the proximate cause; but when a voluntary act intervenes, which in itself is a cause of loss, such act being substituted for the original danger of loss with a design of saving, the substituted act should be regarded as the proximate cause for general average purposes. Decree (D. C. 1902) 118 Fed. 307, affirmed.—*Norwich & N. Y. Transp. Co. v. Insurance Co. of North America*, 129 Fed. 1006, 64 C. C. A. 610; *Same v. Security Ins. Co., Id.*; *Same v. Firemen's Fund Ins. Co., Id.*; *Same v. Chubb, Id.*

[l] (U. S. 1896) The abandonment of a voyage, after a stranding at its commencement, and the sale of a cargo of coal, is not such a sacrifice in the face of impending danger of physical injury as will make the freight a charge in general average; nor is it sufficient that such cargo must have been stored in barges pending repairs estimated to require 30 or 40 days, with a possibility of being frozen in by approaching winter.—*Earnmoor S. S. Co. v. New Zealand Ins. Co.* (D. C.) 73 Fed. 867.

[m] (U. S. 1896) After a negligent stranding on a reef, the ship was flooded, in order to steady her upon the rocks, to prevent pounding and consequent breaking up of the ship. The ship was thereby saved and the voyage completed. The libellant's casks of wine having been assessed in general average for the salvage operations in getting ship and cargo off, *held*, that the wine was bound to contribute, inasmuch as the act of flooding was a general average act.

designed by the master for the safety of the whole adventure, and was successful in preventing the breaking up of the voyage.—*Pacific Mail S. S. Co. v. Dupre* (D. C.) 74 Fed. 250; *Same v. De Lima*, Id.; *Same v. California Vintage Co.*, Id.; *Same v. Kohler*, Id.

[n] (U. S. 1898) Where a vessel's fore peak suddenly filled with water, which was believed by the master and officers to come from a hole below the water line, endangering the safety of ship and cargo, and they thereupon opened the sluices to the next compartment, knowing that goods therein would necessarily be damaged, in order to discover and repair the leak, *held*, that this was a case for general average, though the leak turned out to be in the hawse pipe, and was easily repaired, and the voyage continued.—*The Wordsworth* (D. C.) 88 Fed. 313.

[o] (U. S. 1898) A steamship company which directs its steamers to skirt the Windward Islands for the entertainment of passengers, but fails to supply the vessel with proper charts, is itself in fault for a stranding from going too close inshore, and is not entitled to general average contribution from the cargo.—*Trinidad Shipping & Trading Co. v. Frame, Alston & Co.* (D. C.) 88 Fed. 528.

[p] (Eng. 1897) A ship, laden with a perishable cargo which could not be discharged, having on her voyage become incapable of moving through damage to her propeller, is, with her cargo, in peril, although the ship be tight and strong, and, if a portion of the cargo be damaged by water entering when the ship is tipped to be repaired, the cargo owners have a right to a general average contribution.—*McCall v. Houlder*, 66 Law J. Q. B. 408, 76 Law T. (N. S.) 469, 8 Asp. 252.

[q] (Eng. 1899) Plaintiff shipped a cargo of live stock under a contract providing that the steamer should not call at Brazilian ports before landing, and that average, if any, should be adjusted according to the York-Antwerp rules. On the voyage the vessel sprung a leak, and for safety the captain put into a Brazilian port for repairs. The landing of the live stock at its destination was rendered impossible under the foreign animals order, prohibiting the landing of animals if the steamer conveying them had touched at a Brazilian port. The live stock were sent on to Antwerp, where they were sold at a less price than they would have realized at the port of their destination, and the plaintiff also incurred expense in respect to extra wages for their cattlemen and the cost of feed and water while at the Brazilian port. *Held*, that putting into such port was a general average act, and the loss on the sale of the live stock, being the direct consequence of such act, was admissible in general average.—*Anglo-Argentine Live Stock & Produce Agency v. Temperley Steam Shipping Co.*, 68 Law J. Q. B. 900, [1899] 2 Q. B. 403, 81 Law T. (N. S.) 296, 48 Wkly. Rep. 64, 8 Asp. 595.

[r] (Eng. 1901) A ship was chartered to carry a cargo of coals from Cardiff to Esquimalt. During the voyage the coals began to heat, and the captain decided, for the safety of the ship, freight, and cargo, to bear up for Buenos Ayres. Upon examination it was found that the condition of the coals was such that the cargo could not be carried with safety to Esquimalt, and it was condemned and ultimately sold. While at Buenos Ayres the ship and cargo were in safety. *Held*, that under the circumstances the sale of the cargo constituted the abandonment of the voyage, and that as at that time the common danger had ceased there was no such general average sacrifice of the freight as would form the subject of general average contribution.—*Iredale v. China Traders' Ins. Co.*, 69 Law J. Q. B. 783, [1901] 2 Q. B. 515, 83 Law T. 299, 49 Wkly. Rep. 107, 5 Com'l Cas. 337, 9 Asp. 119.

III. LOSSES AND EXPENSES WHICH MAY BE SUBJECTS OF COMPENSATION.

1. Loss of or Damages to Cargo.

[a] (U. S. 1868) On a lawful sale of a portion of a cargo by a master for the general good of the ship and cargo, it should be accounted for on a general average.—*The Brewster* (D. C.) 95 Fed. 1000.

[b] (U. S. 1896) Where a ship failed to take the customary supply of coal for the voyage, and encountered a hurricane which protracted the voyage so that she was obliged to burn ship's materials and cargo, *held*, that she must bear, as particular average, the loss of such materials during the time the coal she ought to have taken would have lasted, and that the residue of the loss of such material was chargeable to the hurricane alone, and constituted a general average charge.—*Hurlbut v. Turnure* (D. C.) 76 Fed. 587.

[c] (N. Y. 1871) Cotton covered by a risk indorsed on an open policy of insurance was shipped by a bark, the master thereof giving a clean bill of lading therefor. The cotton was loaded on deck without the knowledge or implied consent of the insurer, and was jettisoned to save the vessel. *Held*, that the goods were not within the policy, and there could be no claim for contribution on a general average for their loss.—*Atkinson v. Great Western Ins. Co.*, 4 Daly, 1.

[d] (Eng. 1899) Where, owing to its inherent condition, the cargo must inevitably be destroyed by fire before the termination of the chartered voyage, the freight, being already totally lost, is no longer capable of being sacrificed for the common benefit, so as to become the subject of general average contribution.—*Iredale v. China Traders' Ins. Co.*, 68 Law J. Q. B. 1021, [1899] 2 Q. B. 356, 81 Law T. (N. S.) 231, 48 Wkly. Rep. 48.

2. Loss of or Damage to Vessel.

[a] (U. S. 1896) Incidental injuries to tugs, such as the breaking of hawsers and the loss of a propeller while engaged in pulling off a stranded ship under a contract of hiring by the day, are to be deemed as comprehended in the contract price, and cannot be allowed, in making a general average adjustment, against the various interests in the stranded ship and cargo.—*Earnmoor S. S. Co. v. New Zealand Ins. Co.* (D. C.) 73 Fed. 867.

[b] (U. S. 1902) Where the rudder of a ship was partly torn loose in a gale at sea, and it became necessary to cut it away to prevent its beating a hole in the ship during the storm, its value in its damaged condition before it was cut away is a proper subject for allowance in general average.—*May v. Keystone Yellow Pine Co.* (D. C.) 117 Fed. 287.

[c] (Eng. 1901) Where, in the course of a voyage, the master of a vessel, with a view to prevent it from being lost, cuts away a mast in the belief that it is already a hopeless wreck, there is a general average sacrifice, if such belief proves to have been unfounded.—*Montgomery v. Indemnity Mut. Marine Assur. Co.*, 70 Law J. K. B. 45, [1901] 1 K. B. 147, 84 Law T. 57, 49 Wkly. Rep. 221, 9 Asp. 141, 6 Com'l Cas. 19.

3. Services and Expenses.

[a] (U. S. 1896) A bark with a cargo bound from Chili for New York sprung a leak after proceeding about 1,500 miles, and put in to Valparaiso for repairs. *Held*, on conflicting evidence as to the seaworthiness of the ship at the time she sailed, that the fact that her certificate, issued by the Bureau Veritas, had just expired was not conclusive, and that on all the circumstances, including the contemporaneous judgment at Valparaiso, the seaworthiness of the vessel should be sustained; hence, the cost of putting into the port of refuge, and of the necessary unloading of the cargo there, was a valid charge in general average.—*Grace v. The Mauna Loa* (D. C.) 76 Fed. 829.

[b] (U. S. 1900) An item of general average charges, based on the estimated cost of reloading cargo discharged on account of injury to the vessel, is not properly allowable where, by reason of the fact that the voyage was not resumed, the expenditure was not actually made. *Aliter* under the circumstances, as to estimated commissions.—*The Eliza Lines* (C. C.) 102 Fed. 184.

[c] (U. S. 1902) The wages and provisions of a crew during the time they were engaged at sea in constructing a jury rudder after it became necessary to cut away the broken rudder to save the ship in a storm are proper items for allowance in general average.—*May v. Keystone Yellow Pine Co.* (D. C.) 117 Fed. 287.

[d] (Eng. 1899) Plaintiff shipped a cargo of live stock under a contract providing that the steamer should not call at Brazilian ports before landing, and that average, if any, should be adjusted according to the York-Antwerp rules. On the voyage the vessel sprung a leak, and for safety the captain put into a Brazilian port for repairs. The landing of the live stock at its destination was rendered impossible under the foreign animals order, prohibiting the landing of animals if the steamer conveying them had touched at a Brazilian port. The live stock were sent on to Antwerp, where they were sold at a less price than they would have realized at the port of their destination, and the plaintiff also incurred expense in respect to extra wages for their cattlemen and the cost of feed and water while at the Brazilian port. *Held*, that wages of the cattlemen and the cost of the feed and water were not subjects for general average contribution.—*Anglo-Argentine Live Stock & Produce Agency v. Temperley Steam Shipping Co.*, 68 Law J. Q. B. 900, [1899] 2 Q. B. 403, 81 Law T. (N. S.) 296, 48 Wkly. Rep. 64, 8 Asp. 595.

[e] (Eng. 1901) Expenses incurred by the ship for the benefit of the adventure, though rendered necessary through the master's negligence, may be the subject of a general average contribution from the holders of bills of lading containing a clause excepting the master's negligence.—*Milburn v. Jamaica Fruit Importing & Trading Co.*, 69 Law J. Q. B. 860, [1900] 2 Q. B. 540, 83 Law T. 321, 5 Com'l Cas. 346, 9 Asp. 122.

IV. LIABILITY TO CONTRIBUTE.

[a] (U. S. 1896) The owners of a cargo are liable on an implied promise for general average.—*Wellman v. Morse*, 76 Fed. 573, 22 C. C. A. 318.

[b] (U. S. 1896) Goods discharged in lighters just before scuttling to extinguish fire, and sent forward by another vessel, are bound to contribute to the expense of salving the ship and the remainder of the cargo. 70 Fed. 262 (1895) affirmed.—*Reliance Marine Ins. Co. v. New York & C. Mail S. S. Co.*, 77 Fed. 317, 23 C. C. A. 183; *New York & C. Mail S. S. Co. v. Reliance Marine Ins. Co.*, *Id.*

[c] (U. S. 1882) The underwriter upon the hull is liable to contribute to general average for jettison of the deck load when the custom or usage of the trade in which the vessel is employed is to carry part of her cargo on deck.—*Hazleton v. Manhattan Ins. Co.* (D. C.) 12 Fed. 159.

[d] (Eng. 1901) A charter party, containing a clause excepting the master's negligence, provided that the master should sign bills of lading without prejudice to the stipulations of the charter party, and that the charterers should indemnify the shipowners from the consequences of signing bills of lading under their instructions. The master, by the charterers' direction, signed bills of lading containing no exception of negligence. Expenses on behalf of the adventure having been incurred by the ship, owing to the master's negligence, the cargo owners refused to contribute in general average. *Held*, that if the bills of lading had contained a negligence clause the cargo owners would have been bound to contribute, and consequently that the charterers were bound to indemnify the shipowners for general average contribution not recovered from the cargo owners.—*Milburn v. Jamaica Fruit Importing & Trading Co.*, 69 Law J. Q. B. 860, [1900] 2 Q. B. 540, 83 Law T. 321, 5 Com'l Cas. 346, 9 Asp. 122.

[e] (Eng. 1901) Homeward freight payable under a charter party is liable to contribute to a general average sacrifice made on the outward voyage.—*Carisbrook S. S. Co. v. London & Provincial Marine & General Ins. Co.*, 70 Law J. K. B. 930, [1901] 2 K. B. 861, 50 Wkly. Rep. 42, 6 Com'l Cas. 291.

V. LIMITATION OF LIABILITY BY CHARTER OR BILL OF LADING.

[a] (U. S. 1897) A provision in the bill of lading authorizing the vessel to call at any port whatever does not relieve her of the expense of putting into a port of refuge in consequence of taking an inadequate coal supply.—*Hurlbut v. Turnure*, 81 Fed. 208, 26 C. C. A. 335; (1896) *Hurlbut v. Turnure* (D. C.) 76 Fed. 587.

VI. BONDS.

[a] (U. S. 1896) Cargo owners cannot require a provision for postponement of any suit against the sureties until the end of litigation with the consignees.—*Wellman v. Morse*, 76 Fed. 573, 22 C. C. A. 318.

[b] (U. S. 1896) An average bond should be conditioned in the simplest terms to pay the obligor's share of general average, and it is improper to demand a bond requiring more, or which would in any way prejudice the owner of the cargo in denying liability, or in questioning the amount of it, or which would close any of the methods which the law gives for determining the existence or extent of liability.—*Wellman v. Morse*, 76 Fed. 573, 22 C. C. A. 318.

[c] (U. S. 1896) When the owners of the cargo of a vessel, which has been stranded and rescued by the services of other vessels, give a bond to the owner of such vessel, covering "losses and expenses incurred or to be incurred, which may be a charge by way of general average or otherwise, and providing that claims for tug services or otherwise are subject to approval of an insurance company, or settled by arbitration to which they are a party for us," such owners are liable for their proportion of a sum which the owner of the vessel, upon a settlement approved by the insurance company, has paid to the owners of the rescuing vessels for their services.—*Morse v. Pomroy Coal Co.* (D. C.) 75 Fed. 428.

[d] (Mo. 1897) The execution of an average bond by the owner of the cargo of a sunken vessel, binding him to the payment of such loss, damages, and expenses as shall be made to appear to be due from him, does not absolutely conclude him as to his liability for the amount charged against him by the adjuster, nor preclude him from defending on the ground that the loss resulted from the negligent handling of the vessel.—*Conrad v. De Montcourt*, 138 Mo. 311, 39 S. W. 805.

[e] (Eng. 1897) The parties to an average bond agreed to pay their proper and respective proportions of any general average charges to which they might be liable, and forthwith to furnish to the captain or owners of the ship a correct account and particulars of the value of the goods delivered to them respectively, in order that any such general average charges might be ascertained and adjusted in the usual manner. *Held*, that there was no implied condition to employ an average stater residing at the port of discharge.—*Wavertree Sailing Ship Co. v. Love*, 66 Law J. P. C. 77, App. Cas. 373, 76 Law T. (N. S.) 576, 8 Asp. 276.

VII. ADJUSTMENT.

[a] (U. S. 1901) Where the charterer is, by the terms of the charter, required to pay the freight on goods lawfully jettisoned during the voyage, the consignee is entitled to allowance therefor in the general average adjustment, but is assessed only on the foreign value of the goods, less the freight, which is assessed to the vessel. Decree (D. C. 1899) 95 Fed. 837, affirmed.—*Christie v. Davis Coal & Coke Co.*, 110 Fed. 1006, 49 C. C. A. 170.

[b] (U. S. 1896) Where various interests in a stranded vessel and cargo, in order to avoid "greater general average expenses," made an agreement for the allowance of the freight to the charterers as a condition of the abandonment of the voyage, *held*, that such agreement was not binding on insurers who had not joined in or assented to it, even though the terms of the agreement would not have prejudiced them.—*Earnmoor S. S. Co. v. New Zealand Ins. Co.* (D. C.) 73 Fed. 867.

[c] (U. S. 1897) In a general average adjustment to be stated "according to the established usages and laws" of the port of New York, the allowance of freight upon jettisoned goods is the full freight as per bill of lading. The recent practice of the English adjusters to allow only net freight in such cases has not been adopted in New York.—*Chrystal v. Flint* (D. C.) 82 Fed. 472.

[d] (U. S. 1900) Although, under the circumstances of a case, salvage is a matter of particular averages against the vessel, cargo, and freight severally,

yet where such averages arose out of a peril which renders a general average necessary they are to be deducted in ascertaining contributory values for the purpose of the general average.—*The Eliza Lines* (C. C.) 102 Fed. 184.

[e] (U. S. 1900) In a general average adjustment no deduction is to be made from freight charged against the cargo owner because the cargo has been subjected to particular average charges for salvage.—*The Eliza Lines* (C. C.) 102 Fed. 184.

[f] (U. S. 1900) In computing contributory values for the purpose of a general average adjustment it is not necessary that they should all be taken at the same time and place, but, according to the custom of Boston, the value of the vessel is obtained by taking her value at the port of refuge, and adding to it the benefit she received from the general average, while the value of the cargo is taken according to the place and time of its arrival at the port of destination.—*The Eliza Lines* (C. C.) 102 Fed. 184.

[g] (U. S. 1900) Although a court directs that contributions to general average be made on the basis of the completion of a voyage, interrupted without right by the charterers, it may also properly direct the adjustment to be made in accordance with the customs of the port where the voyage actually terminated, and where the adjustment is in fact made; the question of what custom shall be adopted being one of convenience, rather than of theory.—*The Eliza Lines* (C. C.) 102 Fed. 184.

[h] (Eng. 1896) For the purpose of ascertaining the amount to be contributed to in general average in the case of a ship which has suffered both particular and general average damage, and has been sold as a constructive total loss, the value of such ship is her value at the time immediately preceding the general average sacrifice in respect of which contribution is to be made, and such value is to be ascertained by deducting from the value of the ship at the time she left port the amount which it would have cost to repair the particular average damage, and also the amount for which she was sold as a constructive total loss.—*Henderson v. Shankland* [1896] 1 Q. B. 525.

[i] (Eng. 1896) Where no repairs have in fact been done, the shipowners are not entitled to the one-third "new for old" allowance in estimating the value of a ship, for the purpose of ascertaining the amount to be contributed to in such general average.—*Henderson v. Shankland* [1896] 1 Q. B. 525.

[j] (Eng. 1897) There is no obligation on shipowners to employ an average stater at all for the adjustment of liabilities.—*Wavertree Sailing Ship Co. v. Love*, 66 Law J. P. C. 77, App. Cas. 373, 76 Law T. (N. S.) 576, 8 Asp. 276.

VIII. ACTIONS.

[a] (U. S. 1896) Though, strictly, the right to payment of general average does not, perhaps, always await a discharge of the cargo, yet no admiralty court will enforce payment prior to an opportunity for an inspection of the cargo by its owner for the purpose of determining its contributory value, so that, practically, a prior discharge of the cargo is necessary to enable the owner of the vessel to collect the amount due for general average.—*Wellman v. Morse*, 76 Fed. 573, 22 C. C. A. 318.

[b] (U. S. 1896) In a suit by a shipowner on a cargo owner's general average bond, which contained a recital that the ship, on her voyage, "encountered strong winds and a heavy sea, which caused the vessel to labor severely," *held*, that the libellant was entitled to a prima facie presumption that the ship was seaworthy at the commencement of the voyage. *The Edwin I. Morrison*, 153 U. S. 199, 14 Sup. Ct. 823, 38 L. Ed. 688, distinguished.—*Franklin Sugar Refining Co. v. Funch*, 73 Fed. 844, 20 C. C. A. 61.

[c] (U. S. 1900) Although the owners of a vessel are exempt under the statutes from liability for damage to the cargo resulting from a fire due to the negligence of one of the crew, without their own neglect, they cannot maintain an affirmative action against the owner of the cargo for contribution in general average to the ship's loss; but, when an action for general average is brought by the cargo owner, the damage to the ship must be taken into consideration, as otherwise the cargo owner could recover by selecting his form of proceed-

ings for losses for which the shipowner was not responsible. Decree (D. C. 1899) 94 Fed. 266, affirmed.—*The Strathdon*, 101 Fed. 600, 41 C. C. A. 515; *Burrell v. Armstrong*, Id.

[d] (U. S. 1895) On a question as to the liability of cargo to contribute in general average for damages to the ship caused by the breaking of her shaft, after repairs had once been made and towage declined, *held*, there being no issue as to seaworthiness and the crack in the shaft having appeared after encountering very heavy weather, that seaworthiness at the commencement of the voyage should be assumed.—*Van Den Toorn v. Leeming* (D. C.) 70 Fed. 251.

[e] (U. S. 1899) The fact that the owners of a vessel cannot maintain an action against the owners of the cargo for contribution in general average for the ship's loss by fire because the fire was caused by the negligence of one of their crew, which is imputable to them, does not protect them from a similar action by the owners of the cargo for contribution.—*The Strathdon* (D. C.) 94 Fed. 206.

IX. LIEN.

[a] (U. S. 1896) The lien for general average may be preserved by a qualified or conditional discharge of the cargo.—*Wellman v. Morse*, 76 Fed. 573, 22 C. C. A. 318.

[b] (U. S. 1896) Where a master, in order to preserve his cargo, takes measures such as a wise and prudent man would think most conducive to the benefit of all concerned, he has a lien on the cargo for the expenses so incurred.—*Wellman v. Morse*, 76 Fed. 573, 22 C. C. A. 318.

[c] (U. S. 1896) The lien for general average is one recognized by the admiralty law, and stands on the same footing as a maritime lien on cargo for the price of its transportation.—*Wellman v. Morse*, 76 Fed. 573, 22 C. C. A. 318.

(156 Fed. 558.)

CHICAGO & A. RY. CO. v. UNITED STATES. FAITHORN v. SAME. WANN v. SAME.

(Circuit Court of Appeals, Seventh Circuit. April 16, 1907.) On Rehearing, October 9, 1907.)

Nos. 1,303-1,305.

CARRIERS—INTERSTATE COMMERCE—PAYMENT OF REBATES.

Private tracks built by the owner of a packing plant on its own property, extending from a connection with the tracks of a belt line railroad company to and around its buildings, and used in loading cars for shipment, are not a part of the railroad system, but plant facilities, and the refunding by a railroad company, which made and published a schedule of through rates, including the belt line charge, of \$1 per car to such packing company on shipments made by it and paid for at the schedule rate, on the ground that it was a payment for the use of such private tracks, thus making the rate charged \$1 per car less than that published and charged to shippers generally from the same point, constituted the giving of a rebate, in violation of section 1 of Elkins Act February 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880].

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

For opinion below, see 148 Fed. 646.

Ralph M. Shaw, for plaintiffs in error.

F. G. Hanchett, for the United States.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge. Plaintiffs in error were jointly convicted of violating that part of section 1 of the Elkins Act (Act Feb. 19, 1903, c. 708, 32 Stat. 847) which inhibits the giving of "any rebate * * * in respect of the transportation of any property in interstate or foreign commerce * * * whereby any such property shall by any device whatever be transported at a less rate than that published and filed." U. S. Comp. St. Supp. 1907, p. 880.

The government proved that the Chicago & Alton was an interstate common carrier, having a line extending eastward from Kansas City, Mo.; that the Kansas City Railway Company was an interstate common carrier between Kansas City, Kan., and Kansas City, Mo., having a belt line over which it hauled cars of freight from industries along its tracks to various railroads; that the Schwarzschild & Sulzberger Company, a corporation, owned and operated a meat packing plant at Kansas City, Kan., adjoining the tracks of the Belt Line; that the S. & S. Co. was not a common carrier; that within its plant, and running around and between various buildings thereof, the S. & S. Co. at a cost of \$75,000 built about a mile and a half of tracks, switches, and sidings, on which the annual outlay for maintenance and taxes was \$1,200; that the S. & S. tracks connected with the Belt Line tracks at the property line; that the Alton had arrangements with the Belt Line and with eastern railroads whereby the Alton undertook to transport property in interstate commerce from Kansas City, Kan., to seaboard cities; that the Alton published and filed schedules of rates for such transportation; that the Belt Line published and filed a rate of \$3 a car for hauling cars of freight over its line from the S. & S. plant to the Alton; that the Alton transported various car loads of freight for the S. & S. Co. from Kansas City, Kan., to eastern points, collected from the S. & S. Co. the full amount of the published rates, and paid to the Belt Line \$3 a car, which amount was included in the Alton's published rates; and that the Alton, through plaintiffs in error Faithorn as vice president, and Wann as general freight agent, paid back to the S. & S. Co., under book entries of "refund of terminal charges," \$1 on each car for the use made of the S. & S. tracks in getting the S. & S. Co.'s cars of freight out upon the Belt Line's tracks.

At the conclusion of the government's evidence, plaintiffs in error moved that the jury be directed to return a verdict of not guilty. This motion was overruled. Thereupon plaintiffs in error offered to prove that the use of the S. & S. tracks was reasonably worth \$1 a car. The court excluded the proffered evidence.

These adverse rulings present but a single question. If the fact that the S. & S. Co.'s charge for the use of its tracks was reasonable would take the case out from under the statute, the burden would lie upon the government, in order to bring the case within the statute, to prove that the charge was unreasonable; and this the government did not attempt to do. So the assignments of error center on the challenge of the sufficiency of the government's evidence to sustain the verdict of guilty.

Some discussion in briefs and in oral argument was had over the fact that the arrangement between the Alton and the S. & S. Co. was not published and filed with the Interstate Commerce Commission.

The S. & S. Co. was not a common carrier, and therefore had nothing in the way of rates and charges to publish and file with the commission. Shippers, of course, were interested to learn from the Alton's published schedules not only the rates between different points, but also the terminal charges, if any, that were to be exacted of them in addition to the rates. We think it is clear that the shipping public were not concerned in what part of an Alton through rate was paid by the Alton to the New York Central or to any owner of tracks that were used in making the through shipment. But if divisions of rates or track rentals were required to be published, we think it is equally clear that a failure to publish could not make a rebate of what is not a rebate, and, on the other hand, that publication could not save what is a rebate from being found to be a rebate. So the aforesaid matter of publication has nothing to do with the case.

Payment by the Alton to the S. & S. Co. was in the guise of a "refund of terminal charges," as though the Alton through oversight had collected more than the lawful charges and was rectifying the mistake. But as courts rightly are keen to penetrate an innocent appearing device to reach an illegal transaction, they should also be alert to save a lawful act though it be hid under a false cover. These plaintiffs in error should not be punished for methods of bookkeeping if the false entries represented in fact a lawful arrangement.

The real transaction was the payment by the Alton for the use of the S. & S. tracks in getting S. & S. freight out of the plant to the Belt Line. The consideration was not based on a fixed monthly or yearly rental, or on a percentage of the investment, but was determined by the amount of use measured by wheelage. But rentals on the basis of wheelage are unobjectionable if the parties have entered into a contract which in all other respects is lawful.

This contract was made on the Alton's part through its traffic department. We may know as a matter of common information that contracts respecting right of way, roadbed, and track are usually made through the engineering or maintenance of ways department, and not through freight agents. But, again, these plaintiffs in error should not be punished because the rental was measured by wheelage or because the contract was made by freight agents.

S. & S. received back a part of the money they paid the Alton for freight. That fact alone does not prove that the transaction constituted a rebate within the definition of the statute. A railroad may pay its lawful indebtedness to a shipper out of the money the shipper pays it for freight; or a shipper may pay the full freight partially in money and partially in canceled legal demands against the railroad. The statute's definition of a rebate is any device whereby any property in interstate or foreign commerce is transported at a less rate than that published and filed. So if the full rate be paid either in money or in money's worth, the parties cannot be guilty of rebating. Of course, the money's worth part of the payment might itself be used as a device whereby the property would be carried in interstate commerce at less than the published rate; but in this case the presumption must be indulged that the wheelage charge of \$1 a car measured the true rental value of the S. & S. tracks.

The foregoing considerations compel us to the conclusion that the judgment cannot be sustained except by holding that the contract between S. & S. Co. and the Alton was illegal and void.

The use that the contract provided for was the use that was made in hauling S. & S. freight from inside of the S. & S. plant out to the S. & S. property line, so that there it might be put on the Belt Line's track, which in these through routings is to be taken as a part of the Alton system. Plaintiffs in error defend the arrangement on the ground that an interstate common carrier has the right to pay a shipper a just allowance for the use of any instrumentality furnished to the carrier by the shipper in connection with the transportation of the shipper's property. And attention is called to the closing paragraph of section 15 of the recent Hepburn Act (Act June 29, 1906, 34 Stat. 590) as being declaratory of the law as it stood when the contract now in question was made:

"If the owner of property transported under this act directly or indirectly renders any service connected with such transportation or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable."

It never has been unlawful for a railroad to lease cars from a shipper, like the Armour Company, any more than from a builder of cars, like the Pullman Company. But if cars are leased from a shipper, not only the Hepburn act, but also the Cullom and the Elkins acts, as we regard them, prohibit the extension of favors to the shipper in the way of freight rates under cover of the lease. So, if a railroad in discharging its undertakings as an interstate common carrier may lease tracks from another railroad, we perceive no valid reason for denying a railroad the right to lease tracks from a shipper for a like purpose, provided the rental is fair and does not include, by being excessive, a concession from the established transportation rates. The trouble in this case, however, comes from the fact that the Alton did not take a lease of the S. & S. tracks for the purpose of discharging its undertakings as an interstate common carrier. It had undertaken to carry for all the shipping public a car load of meats from Kansas City, Kan., to New York for \$20, say. For that purpose it controlled, by means of its connections, a public highway. The S. & S. tracks were not a part of that highway. They were not used by the Alton in serving the shipping public generally. Their only use was in getting a particular shipper's freight from his own property out to the public highway. Suppose that the S. & S. Co., instead of ties and rails, had put down a paved roadway on its land, and that the Alton, in addition to the \$20 worth of transportation it was giving to other shippers, furnished horses and wagons to haul the meats from the packing rooms to the Belt Line, would it be contended that the Alton could lawfully still further pay the S. & S. Co. for the use of the pavement? Or suppose that the S. & S. plant was all under one roof, and that the trolleys which convey carcasses and cuts of meat from one department to another were so arranged that the finished produce arrived at the property line adjoining the Belt tracks, could the Alton properly make an allowance for the use of the trolleys as instrumentalities furnished by the shipper in the transportation of property in interstate commerce? In our

judgment, the jury were warranted in finding that the tracks in question were plant facilities, as clearly as the supposititious pavement and trolleys would be plant facilities, and not instrumentalities for the Alton's use in discharging its duties to the public. Wherever the Alton needed tracks for that purpose, it could acquire the land by exercising the sovereign power of eminent domain which had been conferred upon it by the people. But manifestly the Alton could not condemn the S. & S. tracks for the sole purpose of hauling the S. & S. Co.'s product from its warehouse to the Alton's public highway, because that would be a private purpose. Whatever property the Alton could condemn it could acquire by deed or lease, but by taking a lease it could not change a private purpose or use into a public one. The lease of these plant facilities was therefore a device whereby the property of the S. & S. Co. was transported at \$19 a car, while other shippers were paying \$20.

This case is ruled in principle, we believe, by the decision in *Wight v. United States*, 167 U. S. 512, 17 Sup. Ct. 822, 42 L. Ed. 258, that an arrangement whereby a particular shipper was allowed to offset against his freight bills the true value of the use of his teams in hauling the property from the railroad to his warehouse was a discrimination against other shippers of the same class of property in the same city who were compelled to pay the freight in full. It is contended that the citation is inapplicable because the question there was of discrimination and here of rebate. Under the Cullom act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), the standard of comparison was the treatment of other shippers. It was necessary to prove not only that the favored shipper really paid less than the published rate, but also that other shippers paid the full rate or a greater rate than that of the favored shipper. Under the Elkins act the standard of comparison is the published rate. It is only necessary to prove that the favored shipper has had his property transported at a less rate than that published and filed. Both acts were aimed to kill favoritism, and the favoritism in the *Wight Case* was of the same kind and effect as in this. The big manufacturer or dealer has all the advantage over his small competitor that he is legally or morally entitled to in his savings of labor cost and in buying his materials at greater discounts. The application of the maxims of merchandising to railroad-ing was always counter to the common-law pact between the railroads and the people. But it was not until the government as *parens patriæ* was authorized to represent the scattered and unorganized sufferers from favoritism that any hope appeared of taking the railroad business out of the realm of private barter.

We exclude from the case, as not being within the issues, any question of the right of a railroad to render greater service or to furnish more facilities for one shipper than another for the same published charge. The issue here is the right to furnish the same or more at a less price.

GROSSCUP, Circuit Judge (concurring). I cannot bring myself to the conclusion that until the cars loaded with the products of the S.

& S. Company actually reached the rails of the Terminal Railroad Company, such products were not already in course of interstate transportation—that until the rails of the Terminal Company were reached, neither the shipper nor carrier were subject to the obligations, or entitled to the rights, that shippers and carriers are subject to, and acquire, only when the things to be shipped have reached the stage of being actually in course of interstate transportation. My personal view is that the moment the products of the S. & S. Company passed out of its hands into the cars of the Terminal Company for transportation, whether the cars thus receiving such products were at the time on the rails belonging to the S. & S. Company, or on the rails belonging to the Railroad Company, the interstate transportation of those products had already commenced; and that the published rate is a rate for the whole of that transportation, from the moment it thus begins to the moment the goods reach their destination; from which it follows, it seems to me, that as against the S. & S. Company, notwithstanding the fact that the Railroad Company receives the goods at the S. & S. Company warehouses, and on its rails (no additional terminal charges having been fixed) the Railroad Company could not lawfully exact more than the regular published rates; while in the performance of its obligations to other shippers, under the Interstate Commerce law, it could not lawfully accept less. In other words, under the facts presented, the published rate is not affected by the fact that the cars were loaded at the S. & S. Company's warehouses, and not on the Company's rails—such place of loading being, along with the Railroad Company's freight stations, "Kansas City" within the meaning of the published rates.

Now I am inclined strongly to the judgment that through contract with the parties interested, the Railroad Company could, at its own expense, lawfully have laid its own rails up to and along side of the S. & S. Company's warehouses, notwithstanding the fact that title to the land under the rails should remain in the S. & S. Company; or could have leased the rails laid by the S. & S. Company of that company; provided always that the transaction was not a subterfuge to cover up discriminations. But an arrangement of that kind between the two companies cannot, in my judgment, for reasons of public policy that the Interstate Commerce Act was intended to carry out, be lawfully based on division of rates, or in any other way be connected with, or affect, the rate making function of the Railroad Company; for to secure equality among shippers, the law commands, not only that the rates shall be equal, but that they shall be fixed and certain—subject to no addition or diminution against, or in favor of, any one—so fixed and certain that any shipper can with his head and pencil figure out from the tariff sheets just what the rate is, both for himself and for his competitors; from which it follows that, while the Railroad Company, through its appropriate department, might lawfully perhaps have leased these rails of the S. & S. Company, paying therefor a reasonable rental, it could not lawfully for the reasons of public policy named, through its tariff department, and on the basis of a division of rates (the whole arrangement secret so far as the published

tariff sheets were concerned) have made the arrangement that was offered as a defense to the offense prosecuted.

The judgment is affirmed.

On Rehearing.

PER CURIAM. The burden of the argument in support of the petition is that the opinion of the court promulgates the doctrine that it is unlawful "for a railroad company to acquire by lease or purchase or other contract the ownership or the right to use a track leading from its right of way to an industrial plant." The facts of the case do not require the affirmance of such a proposition; and we disclaim the inference which counsel draw from the language of the opinion. We do not elaborate because we believe that counsel, on reading the opinion anew, will have no difficulty in understanding that our judgment of the character of the Alton's dominion over the S. & S. tracks was founded on our view that the evidence warranted the jury in finding that "the tracks were S. & S. plant facilities, and not instrumentalities for the Alton's use in discharging its duties to the public."

The petition is overruled.

(156 Fed. 564.)

DIGGS v. LOUISVILLE & N. R. CO. (two cases).

DUNNAWAY v. SAME.

(Circuit Court of Appeals, Sixth Circuit. November 6, 1907.)

Nos. 1724-1726.

1. ACTION—TRIAL—CONSOLIDATION OF CAUSES—POWERS OF FEDERAL COURTS.

Under Rev. St. § 921 [U. S. Comp. St. 1901, p. 685], which authorizes federal courts to consolidate "causes of a like nature or relative to the same question," a Circuit Court has power in its discretion to consolidate for trial separate actions brought against a railroad company to recover for the death of persons who were killed at the same time and in the same manner.

2. CARRIERS—LIABILITY OF RAILROAD COMPANY FOR DEATH OF PASSENGERS—OPERATION OF TRAINS.

Three young men traveling together were passengers on a railroad train which approached Knoxville, Tenn., which was their destination, after dark. The trainmen had announced that the next station would be Knoxville, as required by the state statute, but had not called the station, when the train stopped on a narrow trestle in order to make use of a Y in turning before entering the city. The next morning the bodies of the young men were found near together under the trestle. Upon the trial of a consolidated action against the railroad company to recover for their deaths, there was evidence that they left the car together, while on the trestle, and tending to show that they fell over the edge as they stepped off. *Held*, that neither the announcement of the name of the next station nor the stopping of the train thereafter before it was reached was negligence, nor was either an invitation to passengers to alight before the station was called, which imposed on defendant the duty of warning them or rendered it liable for the deaths of plaintiffs' intestates.

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

G. W. Pickle, for plaintiffs in error.

J. H. Frantz, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit to recover for the wrongful death of William Turpin through the negligence of the Louisville & Nashville Railroad Company. Against the objection of the plaintiffs in error, it was consolidated for trial with two similar cases, one brought by the administrator of James Gamble and one by the administrator of W. W. Dunnaway, who met their deaths at the same time and in the same way. At the close of the testimony for the plaintiffs, the court directed the jury to return a verdict for the defendant. It is claimed the court erred in consolidating the cases and erred in instructing for the defendant.

We are satisfied that under section 921 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 685] the court had the power to consolidate these cases for trial. They involve the same transaction, the witnesses were the same, and we can see no good reason to criticise the exercise of the court's discretion in the premises.

The evidence which the court withheld from the jury showed substantially the following facts: The three young men, Turpin, Gamble, and Dunnaway, were raised in Anderson county, Tenn., about 25 miles from Knoxville. They were not accustomed to railway travel. They left their homes on the 19th of February, 1906, to look up a brother of one of them, who they heard, was working some miles the other side of Knoxville. Apparently they did not find him, and on the 20th they started back to Knoxville. Late in the afternoon of that day they got on a passenger train of the defendant at Mentor, a station seven or eight miles from Knoxville. This train reached Knoxville about 6:30 p. m. There was but one station, Chandler, between Mentor and Knoxville. After leaving Chandler, the trainman announced that the next station would be Knoxville. The train, after leaving Chandler, ran along the Tennessee river for some distance, and then crossed over to Knoxville on a bridge and trestle. By this time it was quite dark. On the Knoxville end of this trestle a switch led off from the main track. At the end of this switch there was a narrow platform on the right as you approached Knoxville, which was used in connection with the switch. Beyond this platform, going in the direction of Knoxville, the trestle for some distance remained the width required for one track only, and then broadened as the switch left the main line. About 200 feet beyond the point of this switch, the main line divided into a Y; one track running to the right to the passenger depot, and the other to the left to the switching yards. It was customary to use this Y in order to change the direction of the train before running into the depot. When the train reached the trestle, it stopped presumably short of the switch. The three young men, one a boy of 15, got up from their seats in the smoker, which was in the forward part of the train next to the baggage car, and went out the front door. The station of Knoxville had not yet been called, nor any reason given them to

believe that they were at Knoxville, except the fact that the announcement had been made that the next station would be Knoxville. This announcement had been made a few minutes before the train stopped. Three witnesses put the time from one to one and a half or two minutes, one says before the train reached the bridge, and several testified that the custom on the road was to announce the next station shortly after leaving the last one. Such announcement was not regarded as a call of the station, which was made subsequently when the station was reached. About 6 o'clock the next morning, on the 21st of February, a witness who passed under the trestle found the dead bodies of three young men, who were subsequently identified as Turpin, Gamble, and Dunnaway. They lay close to one another, and no footprints were near them. The court below, conceding that the deceased persons were passengers, after referring to the fact that the laws of Tennessee required the railroad company to announce the next station, stated that, if the insistence of the plaintiffs was correct, "when the company does it, it would have to guard against anybody jumping off before the train reached the station, would have to put a man in each door, and keep them from jumping off, if the train should happen to stop for any purpose before it reached the station"; and directed a verdict in favor of the defendant in each case.

We think there was testimony from which the jury might have inferred that the three unfortunate young men were passengers, and that they alighted from the train on the trestle and met their deaths by falling from it to the place where they were found. They may have fallen directly from the train through the trestle, or from the trestle after alighting from the train, and they may have fallen from the trestle by missing their footing while trying to proceed in the direction of Knoxville after the train had passed, or by being pushed off by the train after it had got again in motion. There was no testimony showing precisely where the train stopped. There was a small platform on the right, located at the point of the switch, which was used by railroad men to stand on while operating the switch. If the train stopped opposite that platform, the young men had a place to stand, but after the train passed on they would have found themselves isolated, in a dangerous position, and it would naturally have seemed necessary to them to walk on in the direction of Knoxville, whose lights they could see in the distance. If they did this, after leaving the small platform, a few steps would have brought them to the narrow single track trestle above the place they were found, and from which they must have fallen. At this point the ties were 12 feet and 10 inches in length, and a passenger car is about 11 feet, 6 inches in width. An engineer who made a survey of the track testified that a "passenger alighting on this single track trestle might touch the edge of the ties, although I don't think he would. The ends of the ties were approximately practically under the outside of the steps, and the steps would put him where he would fall; he might catch two or three inches of the ties, two inches." It was necessary, in order to make a case for the jury, for the plaintiffs to present some testimony tending to show that the young men, without any fault on their part, alighted from the train and met their

death because of the negligent conduct of the railroad company or its employés. In view of the facts, the negligence must have consisted either in making the announcement that Knoxville would be the next station before it was reached, or in stopping on the trestle after the announcement was made and before the station was reached, or in so stopping without warning the passengers to keep their seats, because the station had not yet been reached.

As to the announcement, it was one required by the laws of Tennessee. Shannon's Code, § 3070. This statute came before the Supreme Court of Tennessee in the case of *Payne v. Railroad Co.*, 106 Tenn. 167, 61 S. W. 86. There there was a call of the station and a passenger alighted before the train had stopped. The effect of the decision was to hold that the passenger was not justified in alighting while the train was in motion because of the announcement. It is to be noticed, however, in this case that the announcement, which was made as the train approached the station, almost amounted to a call which is made just as the station is reached. The difference between an announcement under the Tennessee statute and a call under ordinary railway usages must be kept in mind. An announcement under the Tennessee statute is not a notification that the station has been reached, and an invitation for passengers to alight. It serves the purpose of advising passengers in advance of what the next station will be, so that they may be ready to alight when it is reached. It is always made subject to the usages of railways. It does not commit the railway company to a verbal guaranty that the station announced will be the first stop. The railroad company retains the right to control the movement of the train, and if it is necessary to stop for any proper purpose before reaching the station, for instance, to open or close a switch, or to cross another railroad, or to use a Y, it has the right to do so, without notifying the passengers. In other words, the announcement is to be treated as a statement that the next station will be the place named, and not that the next stop will be at the station. Accordingly, in *Minock v. Railway Co.*, 97 Mich. 425, 56 N. W. 780, it was held that a railroad company which had announced the next station was not obliged to warn passengers not to alight when it stopped at a railway crossing before the station was reached.

We have examined a number of cases where, after calling the station, the train either stopped short or overran, with the result that the passenger alighted in a dangerous place and was injured. Under such circumstances, the railway company has been almost uniformly held responsible. This is in accordance with the well-established rule that a carrier of passengers is in duty bound not only to use the strictest vigilance in receiving and conveying a passenger to his destination, but also to put him off safely at a station at the termination of the journey. As a corollary it has been held that it is likewise the duty of a carrier to announce the name of the station on the approach of the train, and to afford passengers sufficient time to alight with safety. *Englehaupt v. Erie R. R. Co.*, 209 Pa. 182, 185, 58 Atl. 154; *Weiler v. London, Brighton, etc., Ry. Co.*, L. R. 9 C. P. 126; *Van Horn v. Central R. R. Co.*, 38 N. J. Law, 133; *P. W. & B. R.*

R. Co. v. McCormick, 124 Pa. 427, 16 Atl. 848; Bridges v. North London Ry. Co., L. R. 7 H. L. 213; McNulta v. Ensich, 134 Ill. 46, 24 N. E. 631; Memphis & Little Rock Ry. Co. v. Stringfellow, 44 Ark. 322, 51 Am. Rep. 598; Ellis v. Chicago, M. & St. P. Ry. Co., 120 Wis. 645, 28 N. W. 942.

The present case, however, is not one where the station had been called and the train either stopped short or overran it, so that the passenger alighted in a dangerous place and received injuries. This case is more like that of Mitchell v. Grand Trunk Ry. Co., 51 Mich. 236, 16 N. W. 388, 47 Am. Rep. 566, where the station was announced or called before arriving at a railway crossing or junction, 300 or 400 feet from the station. The train stopped at the crossing, and the plaintiff in attempting to leave the car was hurt. The court said the real cause of the injury was the mistaken supposition of the passenger that the train had stopped for the station. There was nothing at the spot to indicate a landing place. The stoppage of cars was required by statute, as well as by usage. The judgment below was reversed on the ground that there was nothing to show any negligence on the part of the company. In the case of Ill. Central R. R. Co. v. Warren, 149 Fed. 658, 79 C. C. A. 350, it was held that the announcement of the next station, although made on near approach to the station, was not an invitation to a passenger to leave his seat and attempt to alight before the train actually stopped. Because he did this, the passenger who was injured was held guilty of contributory negligence.

We have given the present case careful consideration. The case of the plaintiffs rests upon the contention that the stoppage of the train on the trestle after the next station had been announced constituted an invitation to the young men to alight. We think that a clear distinction must be made, as we have said before, between the announcement of the next station and the call of the station at which the train is in the act of stopping. We think that in the present case no passenger of ordinary intelligence and in the exercise of ordinary care would regard the stopping of the train on the trestle as an indication that Knoxville had been reached and the time had come for him to alight, and that the idea that such a view would be taken by any passenger was not within the reasonable contemplation of either the conductor or any of the trainmen. Now, if in the actual course of events these three passengers could not be expected to alight merely because the train had stopped on the trestle, then there was no duty imposed upon the trainmen to warn them to keep their seats. Trainmen have a right to credit passengers with ordinary common sense. Passengers must exercise common sense, common care, or answer for the lack of it. In this country passenger trains are not run upon the theory that the passengers must be locked in when the train is in motion, and only released when the station is reached and the trainmen let them out. Passengers are supposed to have knowledge of common railway usages, of the way in which trains are ordinarily run and handled. While the present case excites our sympathy, we are unable to satisfy ourselves that the court below was wrong in directing a verdict for the defendant. Of course, there was

a possibility that testimony might have been presented which would have showed or at least have tended to show that the defendant was negligent, but no testimony of this sort was introduced, and it is a well-known rule that negligence can neither be presumed nor guessed at. *Powers v. Marquette Ry. Co.*, 143 Mich. 379, 106 N. W. 1117.

The judgments of the lower court are affirmed. The joint writ of error in case No. 1,684 is dismissed for want of jurisdiction.

(156 Fed. 569.)

OSIUS v. DAVIS.

(Circuit Court of Appeals, Sixth Circuit. November 8, 1907.)

INSURANCE—RIGHT TO PROCEEDS OF LIFE POLICY—EVIDENCE CONSIDERED.

Evidence considered in a suit of interpleader between the widow and a former partner of a decedent to determine the right to the proceeds of a policy of insurance on his life, which was by its terms payable to his estate, but by an agreement between the partners was to be held for the benefit of the partnership, and *held* to sustain the claim of the widow that the partnership had been dissolved some months prior to her husband's death, and all matters between the partners settled.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

T. B. Bradfield, for appellant.

C. W. Nichols, for appellee.

Before LURTON, SEVERNS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a bill of interpleader filed by the New York Life Insurance Company against Rudolph Osius and Nellie Belle Davis, who by stipulation have become, respectively, the complainant and defendant in the litigation. The matter in dispute is the amount of a policy of \$5,000, written by the New York Life Insurance Company, December 30, 1903, upon the life of William Francis Davis, husband of the defendant, who died September 25, 1904. The policy was payable "to the executors, administrators or assigns of the insured, or to such beneficiary as may have been duly designated." It also provided that the insured might change the beneficiary by written notice to the company, but that no designation or change of beneficiary should take effect until indorsed on the policy by the company at the home office. The amount due under the policy has been paid into the court below. The bill of interpleader was brought against Mrs. Davis "personally and as executrix of the last will and testament of her husband." Rudolph Osius was made a defendant "as sole surviving member of the late copartnership duly organized and doing business under the firm name of the American Dental Syndicate," which was composed of William Francis Davis and Rudolph Osius, the latter being general manager, while Davis was the business manager. Rudolph Osius claims the amount of the policy as sole surviving member of the American Dental Syndicate, claiming that this policy and one upon his own life were taken out by the syndicate, the premiums paid by the syndicate, and that there was an agreement that the policy was to be for the benefit of the syndicate and payable to the surviving

member. Nellie Belle Davis was the executrix of her husband's will and his sole legatee, and as such she claims the amount of the policy. The court below heard the testimony, and in a considered opinion held that the firm known as the American Dental Syndicate was dissolved, and its assets divided, on May 21, 1904, some four months before Davis died, and therefore the policy, according to its terms, was payable to her as executrix and sole legatee. From this decree there is an appeal to this court.

Prior to March 23, 1903, Rudolph Osius owned and operated dental establishments in the cities of Grand Rapids, Battle Creek, Flint, and Lansing, Mich., under the name of the "American Dental Syndicate." On that date William F. Davis, who was a lawyer living in Lansing, became his partner. Under the agreement Davis was to pay to Osius the sum of \$5,000, \$1,000 down, and \$4,000 from the earnings to which Davis would be entitled less his salary; and it was expressly agreed that the title to one-half of the business was to remain in Osius until the promissory note of \$1,000 was paid in accordance with its terms. Osius was to be the general manager and Davis the business manager of the firm, the former to receive \$50 per week and the latter \$40 per week. While the business of this copartnership was going on, two life insurance policies of \$5,000 each were taken out, one by Osius and one by Davis, December 30, 1903. Frederick Cody was the agent of the life insurance company. The premiums on the two policies amounted to \$269.20, being \$128.75 for the Davis policy, and \$140.45 for the Osius policy. Cody paid the premiums, and then settled with the policy holders. The premium on the Davis policy was partly paid by the partnership and partly by Davis himself, the last payment being \$46.10, made on July 28, 1904. The receipt from Cody to Davis shows that it was in full settlement of the balance of the premium on his policy, and also in full settlement of his interest in the note given under the agreement dated December 31, 1903. On March 5, 1904, while the firm called the American Dental Syndicate was in existence, an agreement was made between Osius and Davis which provided that the policies should be paid to "the American Dental Syndicate, and not to their personal heirs or assigns," the reason as stated being "the premiums on these policies being paid out of the funds of the American Dental Syndicate, and the policies were taken out designedly for the protection of the American Dental Syndicate." While it is not disputed that this agreement was made, no indorsement was made on the policy, nor was there any notice of a change of beneficiary in accordance with its terms. The policy remained payable to the personal representatives of Davis, and was in his possession at the time of his death.

Such being the situation, the question in this case is whether, as alleged by Mrs. Davis, the partnership between her husband and Osius was dissolved on May 20 or 21, 1904. If it was, then the New York Life Insurance policy became payable, according to its terms, to her as executrix and sole legatee of her husband. We have carefully read all there is in the record upon this subject, and are clear in the opinion that the court below very properly held that Mrs. Davis had sustained the burden of proving the affirmative upon the issues of the case, namely, that the partnership had been dissolved by mutual consent and

a full settlement and adjustment of its affairs had been made. The court below has referred in some detail to the facts which appear in the record and support its conclusions. It is unnecessary to go over these. The statements of Seth Davis and Carmer are quite inconsistent with the theory that the partnership continued to exist after May 21, 1904. After the agreements of May 20 and May 21, 1904, Davis withdrew from the American Dental Syndicate, ceased to be its business manager or have authority to bind it in any way, and restricted himself to the Battle Creek office which he purchased from Rudolph Osius, the other member of the defunct firm. In the agreement of May 20, 1904, made at Grand Rapids, Davis expressly relinquished all his right, title, and interest in the American Dental Syndicate, "ceased to draw salary or have anything to do with the management of the said American Dental Syndicate, the same being turned over to Dr. Rudolph Osius." On May 21, 1904, the National City Bank was notified that after that date the signature of Dr. Rudolph Osius alone would be necessary on checks of the American Dental Syndicate. On July 10, 1904, Osius wrote a letter to Davis which practically admits the dissolution and the fact that the insurance policies had been treated as personal assets. Speaking of another agreement, Osius says, "It certainly only applied to you when a partner in this firm"; the inference being that Davis had ceased to be such partner. Then he says:

"But kindly remember that I particularly except the life insurance account which you and I have, but showed a willingness on my part to pay for half of the same."

Apparently this refers to the statement by Davis that Osius had agreed to pay all bills due from the business, and the exception made of the insurance account was made by Osius, although he says he had shown a willingness to pay for his half of that account. He also asserts that he has not only been extremely square with Davis at all times, but "particularly so at their dissolution."

These and other facts which appear on the record and have been referred to by counsel in the briefs and on the argument satisfy us that the partnership was dissolved months before Davis died, and that there was no thought at that time that the policy on Davis' life was being carried by the partnership or for its benefit. The claim now made by the surviving partner appears to be an afterthought.

The decree is affirmed.



(156 Fed. 571.)

UNITED ZINC COMPANIES v. WRIGHT.

(Circuit Court of Appeals, Eighth Circuit. October 14, 1907.)

No. 2,437.

1. MASTER AND SERVANT—FELLOW SERVANTS—FOREMAN IN MINE.

A ground foreman in mining operations conducted under a general superintendent or manager is a fellow servant with the gang of miners whose work he directs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 491.]

84 C.C.A.—22

2. SAME—INJURY TO SERVANT—ASSUMED RISK.

A drillman in a mine where it was the usual known custom to move the drills by hand up stopes having a practicable grade assumed the risk of injury from such manner of doing the work, and cannot recover from the owner for an injury so received, and he was not relieved from such assumption by a complaint made to the ground foreman of such method and a promise on his part to secure appliances, where he had no authority to do so, either actual or apparent, and whose only duty was to report the complaint to the superintendent, under whose direction all the work was conducted, which he failed to do.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 639, 640.

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

In Error to the Circuit Court of the United States for the Southwestern Division of the District of Missouri.

Edward J. White (Arthur E. Spencer, on the brief), for plaintiff in error.

McPherson & Hilpert and E. O. Brown, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. Wright sued his employer, the zinc company, for damages alleged to have been occasioned by its failure to furnish proper appliances with which to do the work assigned him. Defendant was engaged in lead and zinc mining, and plaintiff, who was an experienced miner, familiar with the operation of the drilling machine commonly used in lead and zinc mining, was employed by defendant as head drillman to take charge of the drilling operations in its mines. He had three helpers. At the time of his injury, he was engaged in moving the drilling machine weighing about 300 pounds up an inclined stope in the defendant's mine. The stope rose at an angle of about 45 degrees. Prior to the time of his injury, when the stope was so steep that miners could not walk up conveniently, defendant had employed a pulley and rope to haul up the machine; but this appliance had been abandoned after the stope became easier. The drillman and his helpers had been for some time, two or three weeks before the time of his injury, carrying the drill up the stope by hand. The evidence tends to show that this method was commonly resorted to in that region when the stopes were not so steep that a man could not walk up and down them. It required the men to lift and move the drill by main force, and, of course, was not so easy as raising it by a pulley; but, when the distance was short and the grade practicable, it was obviously a quicker and more feasible method than stopping to adjust and operate a pulley. When the plaintiff and his three helpers were carrying up the drill on February 14, 1905, he claims that some helper slipped and allowed the weight of the machine to sag back against him, and that the sudden strain injured his back. His counsel recognize that, by entering and remaining in the service of the defendant with full knowledge of its methods of doing business, Wright assumed the usual and ordinary risks of the employment, but place their reliance for recovery of damages upon a complaint alleged to have been made by him that the method of carrying the drill up the stope by hand

was dangerous and securing from the defendant a promise of reparation. He claims that, while waiting a reasonable time for the fulfillment of that promise, he was relieved from the assumption of the risk of remaining in the obviously dangerous service. This will be conceded. *Crookston Lumber Co. v. Boutin*, 149 Fed. 680, 79 C. C. A. 368, and cases cited. But do the facts support the plaintiff's hypothesis? We think not. It is earnestly contended by defendant that the service in which plaintiff was engaged was simple manual labor like that involved in *Gowen v. Harley*, 56 Fed. 973, 6 C. C. A. 190, and that the doctrine of relief from assumption of ordinary risks of service by a complaint of danger and promise of reparation has, on the authority of that case, no application. The difference in the pleadings and conceded facts of the two cases renders the doctrine of that case of uncertain application to this, and, by reason of the view we take of another question, we find it unnecessary to attempt to distinguish or assimilate the two cases.

Defendant throughout the trial contended that Bruce, to whom plaintiff made the complaint and from whom it is claimed promise of reparation was received, was a fellow servant of plaintiff, and that, on familiar principles, his negligence, if any, in failing to secure better facilities for plaintiff to work with was imputable to plaintiff, and created no liability against the defendant. The evidence conclusively shows that Bruce was ground foreman in charge of men performing mining operations for defendant, and that there was a general superintendent who represented the master and who had general supervision over all work above and below the surface of the ground to whom the ground foreman reported and from whom he took directions. The duties and representative capacity of a ground foreman in mining operations conducted under the supervision of a general superintendent or manager have been frequently considered by the courts, and in a general sense the rule is firmly fixed that he is a fellow servant with the gang of miners whose operations he is directing. *Alaska Mining Co. v. Whelan*, 168 U. S. 86, 88, 18 Sup. Ct. 40, 42 L. Ed. 390, and cases cited. *Weeks v. Scharer*, 111 Fed. 330, 334, 49 C. C. A. 372; *Id.*, 129 Fed. 333, 64 C. C. A. 11; *Davis v. Trade Dollar Consol. Min. Co.*, 117 Fed. 122, 54 C. C. A. 636.

But it is contended that Bruce, the ground foreman, had exceptional powers, and so stood for the master in his relation to the miners, that complaint made to him of inadequate and dangerous working appliances was a complaint to the master, and his promise of reparation the promise of the master. In other words, that he was in this particular a vice principal. The answer to this contention requires consideration of the proof. The evidence conclusively shows that the duties of Bruce as ground foreman were to direct the miners where to set up the drill, direct the shovelers where to shovel, direct the location of the underground tracks, and look after everything underground, and that it was a common practice for him at times to help the workmen who were laboring under him in the actual drilling of holes, laying of tracks, and other such work. He was subject to the general orders of the superintendent. He hired men to work in his department and discharged them but the superintendent always paid

them their wages. It was the foreman's duty to report to the superintendent when any new or different appliances or tools were needed, and it was the duty of the superintendent to supply them. He made no report of Wright's complaint to the superintendent, and, of course, the latter took no action thereon.

From the foregoing undisputed facts or from the evidence taken as a whole, all of which has been critically examined, it cannot be claimed that the ground foreman had any right or power to supply any desired working appliance. Neither can it be claimed that Wright, the plaintiff, had any reason to believe he had such right or power. The most that can be claimed is that it was the ground foreman's duty, if Wright or any other workman under him complained about appliances, to report such complaint to the superintendent for his action, and depend upon his judgment whether any appliances should be supplied, and, if so, when and under what conditions. As the foreman had no right or ability to supply the block and tackle in question, his promise to do so, if made, afforded no protection to Wright. His failure to repeat Wright's complaint to the superintendent was the real negligence, if any in the case, and that was a failure to perform one of the duties which devolved upon him as a servant and the risk of which was assumed by all the other servants.

The case is controlled by the principles announced in the Whelan and Scharer Cases, *supra*. Wright assumed the obvious danger and risk incident to carrying the drill machine up the stope as it had been done before, and he is not relieved of the consequences of that assumption by any promise imputable to the master. The Circuit Court erred in not giving the instruction requested by defendant's counsel that plaintiff could not recover.

The judgment must be reversed and the cause remanded for a new trial.

(156 Fed. 574.)

**ST. LOUIS STREET FLUSHING MACH. CO. et al. v. AMERICAN STREET
FLUSHING MACH. CO.**

(Circuit Court of Appeals, Eighth Circuit. October 22, 1907.)

No. 2,507.

1. PATENTS—INVENTION—NEW COMBINATION OF OLD ELEMENTS.

To accomplish a new and useful result within the meaning of the patent law (Rev. St. § 4886 [U. S. Comp. St. 1901, p. 3382]), it is not necessary that a result before unknown should be brought about, but it is sufficient if an old result is accomplished in a new and more effective way; and, if the value and effectiveness of a machine are substantially increased by a new combination of old elements, such combination is patentable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 27-29.]

2. SAME—EVIDENCE OF INVENTION.

That a defendant charged with infringement of a patent for a machine abandoned the machine it was previously making, and adopted that of the patent, that its engineer claimed to be the inventor thereof, and himself applied for a patent, and that the patented machine has largely superseded others previously in use for the same purposes, are all facts entitled to weight on the question of invention.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 40.]

3. SAME—SCOPE—LIMITATION BY PROCEEDINGS IN PATENT OFFICE.

Where an applicant for a patent repeatedly acquiesced in the rejection of broad claims and substituted therefor narrower ones until his application was granted, the owner of the patent cannot be heard to insist that the narrower claims allowed shall cover the same as the broader ones rejected.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 244.]

4. SAME—INFRINGEMENT—STREET FLUSHING CART.

The Ottofy patent, No. 795,059, for a street flushing cart, covers a device for scouring and flushing streets by forcing water under pressure from a tank located on a moving cart, connected by a pipe extending downward to near the surface of the street, forward of the rear wheels, to nozzles having narrow elongated delivery apertures, and so adjusted that the water is forced out of the apertures in a flat sheet nearly parallel with the surface of the street in a forward and lateral direction, so as to loosen up the dirt and force it away to the sides of the street, and into the gutters, without injury to the surface of the street. The combination of parts by which such result is effected was not anticipated, and discloses invention, but the patent is limited by the prior art to the combination and means shown for producing such flat stream nearly parallel to the street. As so construed *held* infringed.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

James A. Carr (John D. Johnson and Charles Claflin Allen, on the brief), for appellants.

Mr. Clifton V. Edwards, for appellee.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This was a suit to enjoin infringement of United States letters patent No. 795,059, granted July 18, 1905, to complainant, the American Street Flushing Machine Company, as assignee of L. F. Ottofy, the inventor. The decree below was for complainant, and defendants appeal.

The object of the invention, as stated in the specification, "is to devise a street flushing cart in which the discharge of the water is easily and accurately controlled by the driver, in which the delivery of the water shall be such as to secure the maximum washing effect without excessive use of water and without damage to the streets," etc. The narrowest claim of the patent and the one which best discloses the principle and means for producing the new result of the invention is the third, and is as follows:

"(3) In a traveling street washing machine, the combination with a tank adapted to contain water under pressure and mounted upon forward and rear supports, of a nozzle or nozzles located sufficiently near the plane of the points upon which the machine is supported to be substantially concealed from view, and having narrow elongated delivery apertures which open laterally toward the front of the machine and are substantially parallel to said plane, said nozzles being constructed and positioned to deliver water under pressure at the side or sides of the machine nearly parallel to said plane, forward and laterally of the rear support and avoiding the front support."

The other broader claims of the patent, in the view we take of the case, need not be specially referred to.

The specification describes the invention as growing out of the necessity of localizing—

"the distribution of water so as to have it strike with considerable velocity at an angle depending upon the nature of the surface so as to have first a scouring and then a flushing effect to carry off before it the loosened material. • • • The nozzles are located close to the ground within a few inches and are directed outwardly and forwardly. They are also between the forward and rear wheels and substantially underneath and concealed by the tank. In operation, therefore, the water is delivered free of the wheels under easy observation by the driver and at the same time the stream is not readily noticeable by pedestrians or passing vehicles. At the same time the water is delivered in a flat sheet nearly parallel with the street and washes the dirt forward and outward without injuring the pavement."

Taking the claims and the specification together, we find the invention is for a device for scouring and flushing streets consisting of and resulting in forcing water under pressure from a tank located on a moving cart connected by pipe to a nozzle or nozzles having narrow elongated delivery apertures, extending downward from the tank and to a position near to the surface of the street forward of the rear wheels, and so adjusted that the water is forced out of the apertures in a flat sheet nearly parallel with the surface of the street in a forward and lateral direction, so as to loosen up the dirt and simultaneously force it away to the sides of the street and into the gutters, without injury to the surface of the street.

There is no claim that any of the elements of the patent are new. The tank, the water under pressure, the nozzle, the delivery apertures, and the means of adjustment are all old, but the contention is that the particular combination of these elements in the patent produces a new and useful result, and is patentable. The new and useful result claimed is the effective loosening up of dirt and material on the street and washing them off into the gutter by one action without injury to the street. To accomplish a new and useful result within the meaning of the patent law (section 4886, Rev. St. [U. S. Comp. St. 1901, p. 3382]), it is not necessary that a result before unknown should be brought about, but it is sufficient if an old result is accomplished in a new and more effective way. If the value and effectiveness of a machine are substantially increased, the new combination of old elements, which does it, is patentable. *Loom Co. v. Higgins*, 105 U. S. 580, 591, 26 L. Ed. 1177; *Cantrell v. Wallick*, 117 U. S. 689, 694, 6 Sup. Ct. 970, 29 L. Ed. 1017; *Anderson v. Collins*, 58 C. C. A. 669, 122 Fed. 451, and cases cited. The proof does not permit us to doubt that the machine of the patent does the work of scouring and flushing asphalt and other smooth streets in a more effective and satisfactory way than it was ever done before. The flat sheet of water operating nearly parallel to the surface of the street works like a shovel to loosen up the material on the street, and carry it along as the cart progresses, in a forward and lateral direction, so that it finds its way into the gutter on the side of the street. The very oblique angle to the plane of the street at which the nearly parallel stream operates protects the surface of the street from injury by the impact of the water under pressure which would necessarily be occasioned by a more vertically operating stream. The nozzles from which the stream emanates, being in front of the hind wheels, makes the operation easily observed by the driver of the cart and permits of little splashing of the wheels.

But it is contended that the device of the patent is only a mechanical

shifting of existing means which does not involve invention, and that, if it did, it was anticipated by several other patents. The new and beneficial result accomplished by the device of the patent already referred to consisting of the more effective and less injurious way of scouring and flushing streets might afford a sufficient answer to this first contention; but there is more. The defendant company as found by the learned trial court and shown by abundant proof, upon being advised of the features of the Ottofy invention, abandoned its old machine made according to the Murphy patent hereafter to be considered, and adopted the device of the Ottofy patent. Murphy, defendant's patentee, upon being advised of the defects in his machine and the objections made to it which Ottofy later remedied, confessed his inability to obviate them. Pickles, the engineer of defendant company, upon hearing of Ottofy's invention, claimed to be the first and original inventor thereof, applied for a patent therefor, and assigned all rights to defendant. These are all significant admissions by experts, and that, too, against interest of patentable novelty in complainant's device. There is also evidence of more or less cogency that that device has superseded other devices in the few cities which employ scouring and flushing machines in use upon smooth or asphalt streets. These facts are entitled to weight when the question is whether the machine exhibits patentable invention. *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 143, 14 Sup. Ct. 295, 38 L. Ed. 103; *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.*, 45 C. C. A. 544, 558, 106 Fed. 693, 707; *Kinloch Tel. Co. v. Western Electric Co.*, 51 C. C. A. 362, 113 Fed. 652; *Id.*, 51 C. C. A. 369, 113 Fed. 659, 665. In *Krementz v. S. Cottle Co.*, 148 U. S. 556, 560, 13 Sup. Ct. 719, 720, 37 L. Ed. 558, Mr. Justice Shiras, in delivering the opinion of the court, after referring to the contention that the step taken by the patentee was one obvious to any skilled mechanic, says the contention is negatived by the conduct of defendant's president, which was in many respects like that of Murphy and Pickles. His language is:

"The view of the court below that Krementz's step in the art was one obvious to any skilled mechanic is negatived by the conduct of Cottle, the president of the defendant company. He was himself a patentee under letters granted April 16, 1878, for an improvement in the construction of collar and sleeve buttons, and put in evidence in this case. * * * His improvement was to form a button of two pieces, the post and base forming one piece and then soldering to the post the head of the button as the other piece. Yet skilled as he was, and with his attention specially turned to the subject, he failed to see what Krementz afterwards saw, that a button might be made of one continuous sheet of metal, wholly dispensing with solder, of an improved shape, of increased strength and requiring less material."

The chief contention of defendants is that Ottofy is anticipated by several United States patents granted before his application was filed. These will now be briefly considered.

The Van Gaasbeek patent, No. 296,488, dated April 8, 1884, is first claimed to constitute a complete anticipation. That was for an "improved street cleaning machine," and had many of the elements of the Ottofy claims, but one and the most important one it did not have, and that was "the narrow elongated delivery apertures." It delivered the water upon the street from a series of nipples or orifices, so that the

stream as it came in contact with the surface of the street was made up of a series of jets, and did not form a thin continuous sheet. Van Gaasbeek made no claim that the stream emitted from the nipples should be delivered upon the street nearly parallel to it. The device of that patent operated more like a rake to stir up and afterwards sprinkle the material on the street, than like a flat shovel inclined so as to scoop up and remove it. We do not think it discloses the combination of the patent in suit, or that a device made under it would perform the function of the device of the patent.

The McDade patent, No. 652,547, of date June 26, 1900, is also claimed to constitute a complete anticipation. That was for "new and useful improvements in street sprinkling machines." It lacks the same essential element that the Van Gaasbeek patent did, namely, "the narrow elongated delivery apertures." It could not deliver the flat continuous nearly parallel stream upon the street. It could only deliver the water in jets somewhat spaced apart, and its action while quite sufficient to sprinkle the street, as obviously contemplated by the patent, was inefficacious to serve as a scouring and flushing device.

The Murphy patents, numbered 736,134 and 736,135, are also relied upon as anticipations. The first mentioned is for an improvement in nozzles. The distinguishing feature is the globular head or hollow sphere at the lower end of a discharge pipe of a tank and a delivery aperture consisting of an elongated curved slot cut through the sphere, so as to permit the water under pressure to escape and be precipitated upon the street. The second is for an improvement in street washers. It has, according to the specification, two objects. First, "to provide means for enabling the driver or operator of the machine to ascertain the pressure within the machine while it is in motion"; and, second, "to provide in connection with the machine a sediment collecting trap for collecting and removing the sediment in a machine of this class," etc. These are totally different objects from those stated in the Ottofy specification. The drawings of the second Murphy patent show the globular nozzle and the spherically elongated slot of the first Murphy patent. The patentee doubtless intended to employ in the operation of the machine of his second patent the nozzle and slot of the first one. But he neither claims nor describes in the specification, nor shows in the drawings any device or means for delivering water from the nozzle in a flat even sheet nearly parallel to the surface of the street. Assuming that defendants are right in claiming that the Murphy device shows the location and adjustability of the nozzle so as to throw water forwardly and laterally, and that the little variances between the two devices in these respects are not functional, we think there is a truly functional difference in the arrangement of the parts by which in the Ottofy device a flat sheet of water is delivered nearly parallel to the surface of the street, whereas, in the Murphy device, the water is not delivered in a flat sheet or nearly parallel to the surface of the street at all. The spherical opening or slit in the nozzle from which the water is delivered is such as necessarily produces a spherically formed sheet of water. It is forced upon the surface of the street more like a scoop than like a flat shovel. The curvilinear flood necessarily

sprays and spatters on the sides or lateral edges of the stream, and has effective operation only for a small space at and near its middle. Moreover, the second Murphy patent discloses no means whereby the sheet of water is delivered nearly parallel with the surface of the street. The angle of inclination to the ground is usually about 40 degrees, and this produces a violent and destructive action of the stream upon the surface of the street. It may be well adapted to flush and scour granite or other streets of rough surface which are not easily injured, but it does not show the elements or disclose the means in combination of the patent in suit. Without stopping to comment upon other dissimilarities between the Murphy and Ottogy devices which may or may not be functional we content ourselves with saying that the distinctively advantageous features of the Ottogy device and the combination of means there disclosed whereby he produces the shovel-like flat stream, and applies it nearly parallel to the street, and which constitute the distinguishing principle of his invention, do not appear in the Murphy patent, and for that reason the latter or any device made pursuant to it is not an anticipation of the Ottogy patent.

The foregoing are the principal patents relied on by defendants as anticipations. The others introduced in evidence have been carefully considered, and none of them are found to so nearly approach anticipation as those already considered. Some disclose one element and some another, but none of them, including those already specifically referred to, disclose all the elements or the combination of elements of the patent in suit. For that reason, they cannot constitute anticipations. *Bates v. Coe*, 98 U. S. 31, 48, 25 L. Ed. 68; *Emerson Electric Co. v. Van Nort Bros. Electric Co.* (C. C.) 116 Fed. 974.

We are not impressed with the contention that the elements of complainant's claims constitute an aggregation, instead of a true combination. We think there is a clear correlation and coaction between the tank pressure, the location of the nozzles near the surface of the street, the narrow elongated delivery aperture, the flat sheet of water emanating from the aperture delivered nearly parallel to the street forward and in a lateral direction. The delivery of the water forwardly and laterally and in a plane nearly parallel to the surface of the street is directly related to and produced by the coaction of all the elements. The doctrine of *Reckendorfer v. Faber*, 92 U. S. 347, 23 L. Ed. 719, and *Palmer v. Corning*, 156 U. S. 342, 15 Sup. Ct. 381, 39 L. Ed. 445, relied on by defendants, has no application to facts like those disclosed in this case.

On the issue of infringement little need be said. Complainant's expert witness compared a machine shown to have been advertised and used by defendants with the device of the patent and affirmed their similarity both in function and means of performance. No contradiction of that testimony appears in the record, and no claim was made below that defendants' machine was not an infringement of complainant's patent, provided the latter was valid. Practically the only contention aside from that of want of patentable novelty, now for consideration, is that the invention of the patent is limited to a narrow compass. This is entitled to serious attention. The state of the art when

Ottoby entered the field was well advanced. The numerous patents pleaded as anticipations and given in evidence disclose that the art of street flushing and washing and the kindred art of street sprinkling had been much exploited by inventors. The field had been thoroughly worked. The mechanism employed was simple and nothing abstruse or obscure was involved. Streams operating forwardly and laterally had been produced before, but no broad flat stream operating so nearly parallel to the surface of the street as to perform the function of a shovel in scouring and flushing the street had ever been produced. In view of the prior art, the novelty and merit of the present patent rest exclusively in the employment of means and in the combination of elements to produce this flat nearly parallel stream. The patent, therefore, is not a pioneer or primary one in any sense, and the owner is not entitled to much range of equivalents. The claims must be limited in their scope to the actual combination of essential parts as shown, and cannot be construed to cover other combinations of elements or different construction and arrangement. *Cimiotti Unhairing Co. v. Am. Fur. Ref. Co.*, 198 U. S. 399, 25 Sup. Ct. 697, 49 L. Ed. 1100; *Kokomo Fence Machine Co. v. Kitselman*, 189 U. S. 8, 23 Sup. Ct. 521, 47 L. Ed. 689; *Greene v. Buckley*, 68 C. C. A. 70, 135 Fed. 520.

That we are correct in this conclusion clearly appears from the contents of the file wrapper in evidence. Ottoby originally claimed (so far as the combination now in question requires us to consider the claims made) forwardly directed nozzles adapted to discharge water forwardly beyond the wheels. This claim, it is observed, was a broad one—to discharge a stream of water in any form and at any angle. The first application was rejected on references and amendments one after another for the period of two years or more followed. One was filed September, 1903, and this is important for our present inquiry. In it a claim was made for means generally like those described in the patent in suit “located sufficiently near the wheel base of the cart to have a forward and lateral scouring action on the street.” Here is found a voluntary limitation, namely, that the stream produced should have a scouring action. This application was rejected on the *Van Gaasbeek* and *McDade* references, among others, and a new one was filed claiming means “for delivering water laterally and forwardly between the front and rear wheels close to the pavement and nearly parallel thereto.” Here is found a further voluntary limitation that the stream produced should be nearly parallel to the pavement. On this application an argument was made by the attorney for Ottoby in which he says:

“The references cited not only cannot accomplish the results accomplished by applicant’s cart, but they fall very far short of suggesting the above-named features. *McDade* and *Murphy* are the nearest references. If they do not anticipate, then none of the references do. *McDade*’s apparatus is a street sprinkler. * * * If we assume that *McDade* could deliver the water under pressure, and assume that he changed his stream from a spray to a solid stream, and even to a flat stream, his machine would be useless as a street flusher. The water would strike the pavement at such an angle as to destroy the pavement and there would be no chiselling or scouring effect.”

A reasonable and fair interpretation of this argument is that it was intended to secure the allowance of the application on the principle that

the angle of delivery of the water upon the street should, in order to accomplish the results claimed, be lower than in the McDade patent. In other words, that the angle of delivery of the Ottofy patent was so nearly parallel to the street that the pavement would not be injured, and that a chiselling and scouring effect would result from it which would not result from a delivery at an angle like that in the McDade patent. After some amendments unimportant for our present purpose, the application with the claims as they now appear was allowed and the patent in suit issued.

From this history it appears that the patentee repeatedly acquiesced in rejections of his application for a broad claim, and substituted therefor narrower claims, one after the other, upon each rejection, until his application was granted for the means whereby water is delivered under pressure forwardly and laterally nearly parallel to the surface of the street. In such circumstances the owner of the patent will not be heard to insist that the narrower claim allowed shall cover the broader rejected claims. *Knapp v. Morss*, 150 U. S. 221, 14 Sup. Ct. 81, 37 L. Ed. 1059; *Corbin Cabinet Lock Co. v. Eagle Lock Co.*, 150 U. S. 38, 40, 14 Sup. Ct. 28, 37 L. Ed. 989; *Hubbell v. United States*, 179 U. S. 77, 80, 21 Sup. Ct. 24, 45 L. Ed. 95; *Computing Scale Co. of America v. Automatic Scale Co.*, 204 U. S. 609, 27 Sup. Ct. 307, 51 L. Ed. 645; *Greene v. Buckley*, *supra*.

The contention that Ottofy's combination of means for producing the flat nearly parallel stream is only a change in location, degree, or shape from the Van Gaasbeek or McDade angle of delivery cannot be sustained. The consideration already given to those patents discloses a difference in the means, a difference in the operation of the means, and a difference in the result between his and their inventions. With such differences his would not constitute an infringement of theirs and of necessity theirs do not constitute anticipations of his. *Kokomo Fence Machine Co. v. Kitselman*; *Greene v. Buckley*, *supra*. The practical difficulty in this case is to definitely declare the extent of complainant's monopoly under its patent. It is easy to say that it shall enjoy a monopoly of the means and the operation of the means found in the combination in question, but this is so general a statement as to be likely to produce misunderstanding in practice. For that reason, we emphasize the fact that the production of the flat stream delivered and operating nearly parallel to the surface of the street is an indispensable element of the invention of the patent. It alone expresses the principle of the invention. The claims, when read in the light of the prior art and the history of the patent in suit as disclosed by the file wrapper, clearly establish that principle; not only so, but the patentee himself so regarded it as appears by the argument of his counsel before the commissioner of patents on the McDade reference. He represented that the angle of the McDade patent say of 20 to 30 degrees to the surface would not give the scouring effect of his nearly parallel stream, but would injure the surface of the street. This representation is not referred to as constituting an estoppel like the abandonment of claims once made and acceptance of others in lieu of them, but as an expression by the patentee, who naturally would best know what the principle of his invention was, concerning that principle.

Some other propositions were ably discussed by counsel and have all been carefully considered by us, but from what has already been said it follows that the decree below was for the right party, and should be affirmed; and it is so ordered.

(156 Fed. 582.)

**WESTINGHOUSE ELECTRIC & MFG. CO. v. MONTGOMERY ELECTRIC
LIGHT & POWER CO.**

(Circuit Court of Appeals, Second Circuit. June 27, 1907.)

No. 268.

PATENTS--ANTICIPATION--ELECTRICAL DISTRIBUTION.

The Stanley patent, No. 469,809, for a system of electrical distribution, was not anticipated by the Zipernowski and Deri article published in London in 1885.

On petition for rehearing.

For former opinion, see 153 Fed. 890, 82 C. C. A. 636.

Before WARD, Circuit Judge, and HOLT, District Judge.

PER CURIAM. This is an application by the defendant-appellant for a rehearing. The complainant-appellee is the owner of patent No. 469,809, granted to it as assignee of William Stanley, Jr., March 1, 1892. This court has found, as Coxe, Circuit Judge, did in the Saranac Case (C. C.) 108 Fed. 221, that Stanley made his invention in November, 1885.

The specifications of the patent, between lines 15 and 37 of the second page, provide as follows:

"In the construction of the coils, P and S, the following principles are to be observed: the first thing to be determined is the length of primary wire. This should be of such length that reacting self-inductively upon its own magnetic circuit the average counterpotential so produced approximately equals the potential applied to the primary circuit. When so constructed an ammeter will practically show no current when the secondary circuit is open.

"To obtain these results in practice I use the following method: I first choose the percentage of efficiency to be obtained. Then having selected a type of magnetic circuit affording as great magnetic conductivity as possible. I apply such a length of primary conductor that acting self-inductively upon its core the difference of the counterpotential and the applied potential multiplied by the current in the converter shall equal the pre-determined loss of energy inevitable in conversion and vary the length of primary wire until the desired results are attained."

This quotation is paragraphed for the purpose of making more clear the statement that this court has determined that Stanley's invention was in discovering that the generator and transformer could be so co-ordinated as to give a self-regulating secondary system by winding the primary wire, when the secondary circuit was open, to the point where there was practically no current through the primary. The statement of his practice which follows, represented by the formula C^2R referred to throughout the case, this court has held to be no part of the invention.

The above findings dispose of substantially all the grounds suggested for a rehearing, except the ground principally relied on, viz., the defense

of anticipation in certain articles known as the "Zipernowski and Deri articles," published abroad in 1885, before Stanley's invention. This defense was fully considered in the Saranac Case (C. C.) 108 Fed. 221, and 113 Fed. 884, 51 C. C. A. 514, in which, after very careful consideration and an abundance of expert testimony, this court held that these Zipernowski and Deri articles were not an anticipation.

The defendant in this case, not being a party or privy in the Saranac Case, raised the question of anticipation again, but the court followed the finding in that case, saying:

"But this court has already considered and disposed of these alleged anticipations, and has held that they failed to disclose the invention in suit."

If those skilled in the art could have learned from these articles in question, published in August, 1885, that the generator and transformer could be so co-ordinated as to give a self-regulating secondary system by using a primary wire of a certain length when the secondary circuit was open, then the Stanley invention was anticipated and the decision in this case should have been in favor of the defendant.

The subject is complicated and obscure, and has received most careful consideration by this court both in the Saranac Case and in this case. The Zipernowski and Deri articles did not contain, to the mind of the court, any statement that the desired end could be obtained by the use of the primary wire in the manner plainly described in Stanley's specifications. Admitting that Zipernowski and Deri did invent a self-regulating secondary system, and that their system involved the same length of primary wire pointed out by Stanley, still we do not think that the articles in question disclosed even to those skilled in the art the fact that the regulation of the length of this wire was the simple method of obtaining the result.

All the other grounds suggested in the petition for rehearing have been carefully considered, and the petition is denied.

(156 Fed. 770.)

PATTON PAINT CO. v. LLOYD.

(Circuit Court of Appeals, Third Circuit. November 8, 1907.)

No. 61.

CONTRACTS—ACTION FOR BREACH—PROOF OF BREACH.

Defendant and others, as members of a syndicate, contemplating the formation of a corporation to sell an enamel paint, entered into a contract with plaintiff to manufacture the same. The contract recited that it was assumed that the product could be made with the plant and equipment then in use by plaintiff, but provided that, if the development of the business showed that additional equipment and machinery were required, the members of the syndicate should provide satisfactory security for the necessary outlay. After the enamel company was formed and the syndicate merged therein, it was found that a new plant would be required to make the enamel, and plaintiff entered into a contract with the company to erect the plant at the company's cost. *Held*, that the money expended in such erection was not under the syndicate contract, but under that with the corporation, and that defendant could not be held liable therefor.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Gordon & Smith, for plaintiff in error.

Lazier & Orr, for defendant in error.

Before GRAY and BUFFINGTON, Circuit Judges, and LANING, District Judge.

BUFFINGTON, Circuit Judge. This is a writ of error to the Circuit Court for the Western District of Pennsylvania. In that court the Patton Paint Company, hereafter styled "plaintiff," brought suit against William F. Lloyd, to recover some \$18,000, alleged to be due it by virtue of a contract it made with Lloyd, the defendant, and four others. The court below gave binding instructions for Lloyd, and, on entry of judgment in his favor, plaintiff sued out this writ.

After careful examination of the case, we are of opinion no error was committed by the court below. The contract of July 24, 1902, between the Patton Paint Company and Lloyd and others, provided for the manufacture by that company of a certain enamel, and it was assumed by all parties it could and would be made in one of the plants of the Patton Paint Company. "It is assumed," the contract provides, "that this product can be manufactured with our present equipment and organization, except as to additional labor to produce the same." The subsequent provision of the contract, viz.—"If the development of the plan indicates that we will require additional facilities and machineries, then the members of the syndicate shall provide satisfactory security or indemnity for such outlay, and shall provide in a satisfactory manner for reimbursement to us for the same"—is to be construed in the light of this assumption and of the fact that the formula for making the paint was not then known to the contracting parties. It was assumed the plaintiff's present plants could make the paint. If this assumption necessitated outlay for additional facilities and machinery to and for the then plants of the company, the expense thereof was to be secured and indemnified by Lloyd and his associates. But the con-

tract made no provision for the contingency that did arise when the formula became known, viz., the necessity of erecting a new factory. The court below we think rightly held the erection of such a new plant was not contemplated by the contract or covered by its provisions. Such being the case, it followed Lloyd could not be held for the price of such plant, unless he bound himself by some other or additional contract than that of July 24, 1902, and such a subsequent contract by Lloyd the plaintiff sought to establish. In its statement of claim it alleged that:

"In or about the months of August or September, 1902, the plaintiff, at the request of said syndicate, commenced the erection of a plant, for the purpose of carrying out said contract, in and upon a certain leasehold acquired by it in the city of Milwaukee and state of Wisconsin, and it was agreed between the plaintiff and the said syndicate, particularly the said William F. Lloyd, one of the members of said syndicate, that the cost and outlay by the plaintiff in the construction and equipment of said plant should be reimbursed by the said syndicate to the plaintiff in each month for the expenditures made during the preceding month."

But on the trial no such alleged understanding by Lloyd was proved. Not only was it shown that the work was done by plaintiff under a written contract with the Van Hoof Enamel Company, a corporation of which this syndicate had become members, but the proof is unquestioned that Lloyd made no contract subsequent to July 24th. In that regard, the testimony was:

"Q. Now, Mr. Patton, did Mr. Lloyd ever promise to pay the expense of constructing that plant? A. Mr. Lloyd? Q. Yes. A. Ever make any promise after the date of this contract? Q. Yes; did they ever at any time in any way make any other agreement with you personally than as appears in the contract of July 24th? A. I don't remember that he ever promised it; no. Q. No other contract with Mr. Lloyd individually than the contract of July 24, 1902? A. That is the only contract I have."

Now, the contract of July 24th contemplated its acceptance by the thereafter to be incorporated Van Hoof Enamel Company. Such incorporation took place on July 28th, all rights under the contract were conveyed to it, and the formula was given to Humphreys, one of its directors, who was not a member of the syndicate. While such transfer did not release the individual members of the syndicate from any liability created by the contract, yet it does show that the syndicate was supplanted by the corporation, and Lloyd testified, without contradiction, that it went out of existence on July 28th, when the contemplated corporation was chartered. There is no testimony that the members of the syndicate as such thereafter met or made any contract. Any meetings at which they were subsequently present were directors' meetings of the Van Hoof Enamel Company. Under these conditions, the directors of that company met on September 10th and authorized the construction by the Patton Paint Company, at a price not to exceed \$10,000, of a new plant in which to manufacture enamel. To pay said sum the five men who had constituted the syndicate agreed to each discount a note of the Van Hoof Enamel Company for \$2,000. This offer of the Van Hoof Enamel Company for the new plant was accepted in writing by the Patton Paint Company, acting by its vice president, who had been present as a director at the meeting of the

Van Hoof Company noted. The work was proceeded with by the plaintiff under this authorization, and charged as it progressed to the Van Hoof Enamel Company. Under these proofs, facts, and writings—concerning all of which there is practically no dispute—no legal liability on the part of Lloyd existed to pay the expenditures incurred by the plaintiff in erecting the new building at the instance of the Van Hoof Company.

The judgment of the court below is therefore affirmed.

NOTE.—The following is the opinion of Acheson, Circuit Judge, in the court below :

ACHESON, Circuit Judge. At the conclusion of the trial of this case in May, 1904, I was of opinion that the plaintiff, under the uncontradicted evidence and the pleadings, could not recover, and that, for the reasons stated in the charge of the court, the jury should be instructed to return a verdict in favor of the defendant. Since the recent argument of the plaintiff's motion for a new trial I have carefully examined this record, and it is clear to me that the binding instructions for the defendant were correct. In charging the jury, it was my purpose to state the controlling facts which were uncontradicted, as explaining for the benefit of the parties the reasons which actuated the court. Having, then, thus set forth the material facts of the case in the charge of the court, I need not repeat them here, contenting myself with a brief restatement of the reasons why, in my judgment, the instructions to the jury were correct.

(1) Under the plaintiff's own proofs, the contract under which the expenditures sued for were made was a contract between the plaintiff and the Van Hoof Enamel Company, a corporation, and not the contract sued on of July 24, 1902, to which the defendant was a party. The plaintiff itself, also, for some months on its books charged that corporation with the first of these expenditures and rendered bills therefor to that corporation.

(2) The expenditures which are the subject of this suit were for an experimental plant. I find no warrant for any outlay for experimental purposes in the contract of July, 1902. Additional "facilities" and "machinery" were, indeed, contemplated by that contract. But the expenditures in question were not for additional facilities or machinery, but were for a plant purely experimental. Hence, I am unable to perceive how liability therefor can be imposed upon this individual defendant because of his contract with the plaintiff. Moreover, the plaintiff, by its letter of August 15, 1902 (which resulted in the contract with the Van Hoof Enamel Company), evidently did not treat the contract in suit (that of July 24, 1902) as warranting the expenditures proposed by that letter, which expenditures are sought to be recovered of this defendant, but the plaintiff specifically asked for authority for the outlay for the proposed experimental plant. Such authority, indeed, it received, not from the defendant, but from the Van Hoof Enamel Company.

(3) Even if this experimental plant could fairly be treated as an additional facility within the meaning of "Condition First" of the contract in suit, then surely such plant could not be thus regarded as a facility until completed. As long as incomplete, it was anything but a facility. That this experimental plant never was completed the uncontradicted evidence for the plaintiff itself clearly showed. Hence, the outlay by the plaintiff being abortive, there could not arise any liability on the part of the individual signers of the contract of July, 1902, to reimburse the plaintiff. For the same reason, no liability could accrue under "Condition Second" of the contract. The failure as a commercial success of the process of manufacture was a condition precedent to liability to reimburse the plaintiff for loss in connection with the project embodied in the contract in suit. Of course, while this experimental plant remained incomplete and inoperative, the question of success or failure could never be reached. I may add that the plaintiff, realizing the importance of the fact of the completion of this plant as a material element of its right of recovery, alleged completion, but the proofs on both sides were to the contrary.

The motion for a new trial is denied.

(156 Fed. 641.)

BENDER et al. v. ENTERPRISE MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. November 8, 1907.)

No. 1,674.

TRADE-MARKS AND TRADE-NAMES—UNFAIR COMPETITION—REPAIR PARTS FOR MACHINE.

The mere making and sale of repair parts for a well-known machine, the patents on which have expired, by other than the patentee and maker of the machine, which also makes and sells such repair parts, is not an act of unfair trade, unless they are put out as the goods of the original patentee, and especially where they are unmarked, while those made by the patentee are marked with its name.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 79.

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

For opinion below, see 148 Fed. 313.

E. L. Thurston, for appellants.

Charles Howson, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This is an appeal from a decree enjoining the defendant from making and selling repair parts for the Enterprise meat chopper, without marking on each the name of the maker. The case was heard on an agreed statement of facts. It appears that the complainant below, the Enterprise Manufacturing Company, had been making and selling meat choppers for many years. It and its predecessor used as a trade-mark for its choppers, and other like hardware, the word "Enterprise." The meat choppers it makes at present have been manufactured since 1883. Since 1891, it has been making what is called the "Enterprise Tin Meat Choppers," and since 1892 that name has been registered as a trade-mark. The original Enterprise Meat Chopper was patented in 1883 and 1886. The patents have long since run out. Since 1887 and 1888, many of the repair parts of the Enterprise chopper have been marked as made by that company. It appears that for many years there has been a large independent trade in the repair parts of meat choppers, and that the defendant below has made and sold many thousand sets of such repair parts. These sets are packed in boxes which are labeled:

"Repair parts for the Enterprise Meat Chopper, manufactured by the Giant Lock Company, Cleveland, Ohio."

The court below held in its decree that as matter of fact the complainant had for many years used the name "Enterprise" as a trade-mark to distinguish its meat chopper from others on the market, and that it was well known to the trade and consumers as the complainant's product; that the wearing parts of the machine had for many years been sold by the complainant independent of the machine, and

that the complainant had an established good will in the business of making and selling such parts; that the defendant had made and sold wearing parts intended for the Enterprise chopper, and such parts were the same shape and appearance as those of the complainant, but were without any markings to indicate the maker, and that, while put up in packages labeled as claimed by the defendant, they reached the consumer without any markings to indicate their origin, and, by reason of this absence, purchasers of the defendant's wearing parts were misled into believing that they were made by the complainant, the well-known maker of the machines. Evidently, as a result of these findings, which virtually decide the case, the court decreed that the defendant be enjoined from making or selling any meat chopper parts not made by the complainant, without distinguishing such parts from similar parts made by complainant, by clearly marking upon each of said parts its own name or the name of the makers.

In its opinion the court refers to three cases: *Flagg Mfg. Co. v. Holway*, 178 Mass. 83, 59 N. E. 667, in which the defendant was enjoined from selling a zither of the peculiar shape of the complainant's without marking it as his own manufacture; *Deering Harvesting Co. v. Whitman & Barnes*, 91 Fed. 376, 33 C. C. A. 558, in which it appears that the parts of which complainant sought to enjoin the making and sale were plainly advertised by catalogue and labeled as the complainant's manufacture; and *Neostyle Mfg. Co. v. Ellam's Duplicator Co.*, 21 R. P. C. 185, in which the court suggested it was the duty of the defendant to mark an ink sold for use in a duplicating machine as its own product, so as to distinguish it from that made by the manufacturers of the machine. The cases referred to by the court are, for the purposes he uses them, in line with the case of *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118, in which it was held that while any one, after the expiration of the Singer patents, was free to make and sell the Singer sewing machine under that name, it must mark the machine with the name of the maker, so that the public might not be misled into thinking it was the product of the original patentees. The decision below apparently extends the doctrine of this case so as to require not merely the machine, when made by others than the original patentees, but the repair parts of the machine, to be marked with the name of the maker. We think this is going too far, and that the resulting limitation upon the rights of the public is unjustified and therefore unreasonable. The cases themselves may be distinguished. In *Flagg Mfg. Co. v. Holway*, 178 Mass. 83, 59 N. E. 667, the zither was of a unique shape. The defendant purposely and wrongfully imitated its shape. The court held he had not the right to do this "to steal the good will attaching to the plaintiff's personality," and, to prevent it, required the defendant's zithers to be clearly marked so as to indicate they were the defendant's, and not the plaintiff's, goods. But in the present case no such attempt was shown. There was no effort to palm off the repair parts of the defendant below as those of the complainant. In the case of *Deering Harvester Co. v. Whitman & Barnes Co.*, 91 Fed. 376, 33 C. C. A. 558, it does not appear that the repair parts were marked as

made by the defendant. They were advertised by catalogue and labeled as of their manufacture, but that was just what was done in the present case. In the Deering Harvester Case, the parts themselves were marked by certain letters showing where each belonged in the machine. This was quite a different thing, and unnecessary in the present case. In the English Case, *Neostyle Mfg. Co. v. Ellam's Duplicator Co.*, 21 R. P. C. 185, there was an attempt to restrain the defendant from selling ink or paper for use on the Neostyle machine. This was defeated; the judgment being for the defendant. Having thus decided the case, the court suggested that they put their names on future tins of ink and this was accepted.

There was no actual deception charged in this case, nor any attempt at proof of any made. The only unfair trade was inferential or constructive. The present case goes on the assumption that unmarked repair parts are to be taken as made by the makers of the machine, the original patentees, and this although the makers marked their repair parts. We think a safer assumption would be, in view of the established trade in repair parts, that unmarked repair parts are to be taken as not made by the makers of the machine or original patentees, but by others. It is not to be inferred that they are made by the makers of the machine, unless so marked. The mere making and sale of repair parts for a well-known machine by other than the makers would therefore not be regarded as an act of unfair trade, unless they were put out as the goods of the original patentee. The patents having long since expired, the manufacture of meat choppers and all their parts are now open to all. To require every repair part, however small, to be branded with the name of the maker, would tend, it seems to us, to stifle competition in the manufacture and sale of repair parts, and put an unnecessary burden upon a large and important branch of trade.

The decree of the lower court is reversed.

(156 Fed. 643.)

NORTHPORT SMELTING & REFINING CO. v. TWITCHELL.

(Circuit Court of Appeals, Ninth Circuit. October 22, 1907.)

No. 1,357.

MASTER AND SERVANT—INJURY TO SERVANT—UNSAFE PLACE TO WORK.

Plaintiff, a boy 16 years old, was employed by defendant at its smelter, and was set to work at night to assist a man in the clean-up yard. This yard was paved with brick, and upon this floor was deposited cones of slag and other refuse which it was the duty of plaintiff and his fellow workman to load on cars and remove, it being necessary to break up the cones for that purpose. On the second night of such work plaintiff was breaking a cone with a sledge, when an explosion occurred by which he was seriously injured. It was shown that when cones contained molten metal, and there was any water or moisture in their vicinity, it was highly dangerous to break them while hot, as if the metal came in contact with water it would cause an explosion; also, that the floor of the yard had depressions where water might stand and that employes, with defendant's knowledge, sometimes emptied water in the yard. Plaintiff was given no instructions nor warning of danger, and, while he

knew the effect if the hot metal came in contact with water, he did not know that there was any water in the yard, and could not see by reason of the darkness, nor did he know that the cone which he was breaking was hot. *Held*, that the questions of defendant's negligence and of contributory negligence were properly submitted to the jury, and that a verdict for plaintiff would not be disturbed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1000, 1001, 1089–1132.]

In Error to the Circuit Court of the United States for the Eastern Division of the Eastern District of Washington.

W. E. Cullen, F. M. Dudley, C. S. Voorhees, and Reese H. Voorhees, for plaintiff in error.

Gallagher & Thayer, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. We have given to the record in this case and to the elaborate briefs of counsel careful consideration, and have reached the conclusion that there is no merit in the appeal. The action is one for damages for serious personal injuries sustained by the defendant in error while at work in the clean-up yard of plaintiff in error's smelter at Northport, Wash.

Among the acts of negligence charged in the complaint against the defendant to the action, and in support of which evidence was given upon the trial, were the following: That the brick floor provided by the defendant as a place for depositing slag from the pots and furnaces used in the operation of its smelter was at all times kept by the defendant in a dangerous and unsafe condition, in that it contained depressions caused by the bricks being worn by long use, in which depressions water frequently collected, so that, when the cones or slag were deposited upon the floor in the course of the defendant's operations, they would frequently rest over a pool of water in such a manner as to cover and conceal the water, and so that, when the cones were broken with the mallet provided by the defendant, the molten metal, if any there happened to be in the cone, would be precipitated into the water, and would explode with terrific and destructive force; that the defendant negligently adopted and pursued a dangerous and unsafe system in conducting its smelting operations, in that it permitted the dangerous slag and cones to be commingled with the harmless ones, with nothing to distinguish one from the other; that cones which are unsafe by reason of containing molten metal become harmless if permitted to cool until the molten metal solidifies; that the defendant negligently permitted and directed the placing of slag and cones on the floor at the times when the persons whose duty it was to remove them in cars were absent, and failed to adopt any rule or system or means by which the danger of injury to its employes from mixing dangerous with harmless slag and cones could be avoided, or the danger be discovered by such employes who should have occasion to go to the place where they were deposited for the purpose of removing them; that the defendant also negligently failed to furnish a sufficient amount of light to enable its employes to see and observe the

dangerous condition of the premises where the slag was deposited; that, if the defendant had adopted some reasonable rule, method, or system by which its employes could know which cones or slag were dangerous and which were not, or how long the slag and cones had been lying upon the floor, or by which the recently deposited cones and slag could be distinguished from those which had been lying there long enough to have cooled until they were safe, the danger to its employes would have been avoided, and the plaintiff in the case would not have received the injuries for which he sued. In addition to a denial of its alleged negligence, the defendant in its answer set up, among other things, contributory negligence on the part of the plaintiff, specifying such contributory negligence, in part, as follows:

"(a) That, if the plaintiff undertook to break up the cone mentioned and described in the amended complaint herein while the same was in the heated state described in said complaint, he did so in direct violation of his instructions received by him in connection with such work, which directed him to break up only such cones as were cooled off.

"(b) That plaintiff failed and neglected to make use of his physical senses in determining whether or not the said cone which it is alleged in said complaint he undertook to break while in a heated, molten state was so cooled as to permit it to be broken within the scope of the instructions received by him in connection with the said work as aforesaid."

The evidence shows that the defendant in error, then a boy 16 years old, applied to one of the shift bosses of the plaintiff in error for work, who put him to work the first night wheeling sand, and the second night told him to help a man named Palamaruck to clean up the yard, which he did. The yard was paved with brick, and upon this floor was deposited from time to time cones, slag, and other refuse, some of which cones contained some molten metal. The shift boss testified that, when he employed defendant in error, he told him to be careful and not get hurt, but it is not pretended that the boy was given any explanation of the dangers attending such work. In his testimony the latter denied that he was told anything whatever, except to help Palamaruck. The defendant in error worked at the job of cleaning up the yard the night of July 1st, and commenced to work the next night at 6 o'clock. Between 10 and 11 o'clock of the latter night, having temporarily finished the work in the yard, he and Palamaruck went to another part of the smelter to break sows, returning to the yard about half past 12. They found there some more refuse, and had almost finished loading one car, by means of which the refuse was removed, when the defendant in error saw a cone lying on the floor of the yard which also required removal. A sledge hammer weighing about 10 or 12 pounds was provided by the plaintiff in error for the breaking of such cones, which hammer was lying there on the floor, and that hammer the defendant in error took and with it struck the cone one blow, and raised it to strike another, when a terrific explosion occurred, resulting in his serious injury.

The evidence is without conflict that, when such cones contain only slag, they may be safely broken even when red hot, but that, when they contain any molten metal and there is any water or moisture in their vicinity, it is highly dangerous to break them when hot. The defendant in error himself several times testified that he knew this to

be so. What he did not know, however, according to his testimony, was that there was any water on the floor of the yard, or that there were any depressions in the floor in which water could gather. Nothing to that effect was explained to him, nor was he told how long cones containing molten metal had to stand before being cooled enough to break with safety. There was also direct testimony to the effect that molten metal could not explode unless brought in contact with water or moisture, or with some cold damp substance. On the part of the plaintiff, evidence was given tending to show that there were depressions in the floor, and that water was frequently thrown upon the floor of the yard, which latter fact was also testified to by the shift boss of the defendant who employed the plaintiff, from whose testimony in that regard we extract the following:

"Q. I will ask you whether or not there were any rules with respect to the use of water in the clean-up yard?

"A. Well, that place we always observed less or more for the water. I kept the water out of it, yes, sir; and I always gave orders to that effect, too.

"Q. That there should be no water put in there?

"A. Yes, sir.

"Q. Had you ever endeavored to enforce those orders?

"A. Well, I stopped them several times, but they would do it. It seems like sometimes.

"Q. Were any of the men discharged for using water there?

"A. No, sir; not as I know of, but I threatened to, that I would do so.

"Q. Had you seen any water used in that part of the yard at all?

"A. No, sir.

"Q. Had you seen any used in that part of the yard on the previous shift when you were on there?

"A. I did later, when they dumped a settling pot there one time that it exploded a little. There was water there, and they drew out a settling pot, and it set the building a little on fire.

"Q. That was how long before this accident?

"A. I don't know.

"Q. A week or a month?

"A. It might be.

"Q. You cannot fix the time any more definite than that. You mean it may be a week or a month before the accident that you saw this?

"A. I don't understand that.

"Q. I asked you to fix as definitely as you could how long before the accident that you saw water around there at the time the settling pot was dumped in it, whether it was a week or month or how long it was, as near as you can tell.

"A. Well, I did not see any on the night shift, but there might be some put on the day shift. Sometimes in the day we would pull out settling pots. I don't know how long before it was."

It is true that there was no direct testimony that there was at the time of the accident water on the floor of the yard; but there being testimony going to show that the defendant frequently permitted water to be put there and that it was dangerous to do so, and that molten metal could not explode unless it came in contact with water or moisture or some cold damp substance, it was plainly a matter for the jury to say whether the explosion in question was or was not caused by the molten metal contained in the cone that the plaintiff struck coming in contact with the water that the defendant permitted to be put on the floor of the yard. *Marande v. Texas Pacific Ry.*, 184 U. S. 173, 22 Sup. Ct. 340, 46 L. Ed. 487. While the plaintiff did distinctly testify

more than once that he knew that molten metal would explode when it came in contact with water or moisture or with any cold damp substance, he also testified that he did not know that there was any water on the floor of the yard, and that there was nothing to indicate it so far as he could see, that it was somewhat dark in the yard and that the cone did not look red, and that he did not know it was hot, nor that it contained any molten metal. He also testified that he was not given any explanation whatever of any danger attending the work that he was put to do.

The Supreme Court, in the case of *Mather v. Rillston*, 156 U. S. 391, 398, 15 Sup. Ct. 464, 467, 39 L. Ed. 464, said:

"All occupations producing articles or works of necessity, utility, or convenience may undoubtedly be carried on, and competent persons, familiar with the business and having sufficient skill therein, may properly be employed upon them; but in such cases where the occupation is attended with danger to life, body, or limb it is incumbent on the promoters thereof and the employers of others thereon to take all reasonable and needed precautions to secure safety to the persons engaged in their prosecution, and for any negligence in this respect, from which injury follows to the persons engaged, the promoters or the employers may be held responsible and mulcted to the extent of the injury inflicted. The explosive nature of the materials used in this case, and the constant danger of their explosion from heat or collision, as already explained, was well known to the employers, and was a continuing admonition to them to take every precaution to guard against explosions. Occupations, however important, which cannot be conducted without necessary danger to life, body, or limb, should not be prosecuted at all without all reasonable precautions against such dangers afforded by science. The necessary danger attending them should operate as a prohibition to their pursuit without such safeguards. Indeed, we think it may be laid down as a legal principle that in all occupations which are attended with great and unusual danger there must be used all appliances readily attainable known to science for the prevention of accidents, and that the neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence. If an occupation attended with danger can be prosecuted by proper precautions without fatal results, such precautions must be taken by the promoters of the pursuit or employers of laborers thereon. Liability for injuries following a disregard of such precautions will otherwise be incurred and this fact should not be lost sight of. So, too, if persons engaged in dangerous occupations are not informed of the accompanying dangers by the promoters thereof, or by the employers of laborers thereon, and such laborers remain in ignorance of the dangers and suffer in consequence, the employers will also be chargeable for the injuries sustained. Both of these positions should be borne constantly in mind by those who engage laborers or agents in dangerous occupations, and by the laborers themselves as reminders of the duty owing to them. These two conditions of liability of parties employing laborers in hazardous occupations are of the highest importance, and should be in all cases strictly enforced."

And in the recent case of *Mountain Copper Company v. Pierce*, 136 Fed. 150, 69 C. C. A. 148, where an unexperienced servant was directed by the defendant smelting company to adjust a belt on a pulley shaft without instructing him with reference to a collar and set screws projecting from a shaft by which he was caught and seriously injured while endeavoring to adjust the pulley, we said:

"He [the plaintiff] testified that he knew nothing about the collar or set screws, and that neither the foreman nor Ryan nor any one else told him of their existence, nor the danger attending the operation, or how to perform it. While it is contended on the part of the plaintiff in error that both the collar

and set screws could have been seen by the defendant in error if he had properly looked, it is not contended that he was told of their existence or of the danger attending the operation or how to perform it. True it is that the defendant in error knew that it is dangerous to approach shafting, belting, or other machinery in motion. That fact not only appeared from his own testimony, but is a matter of such common knowledge that every one in his senses must be held to know it. Nevertheless it is the duty of the master, before sending or permitting an inexperienced employé to perform such dangerous work, to instruct him how to perform it, and especially to inform him of any hidden, concealed, or obscure danger. * * * The law in our opinion made it the duty of the plaintiff in error to inform the defendant in error of the collar and set screws, and how to perform the dangerous task, before sending or permitting him, in the course of his employment, to undertake it."

In the present case, the court below correctly left it to the jury to determine both the question of the alleged negligence of the defendant and the alleged contributory negligence on the part of the plaintiff under instructions which fully covered both questions, and which were quite as favorable to the plaintiff in error as they should have been.

The judgment is affirmed.

NOTE.—The following is the opinion of Whitson, District Judge, on overruling the motion for new trial:

WHITSON, District Judge. On the first trial I was of the opinion that the proximate cause of the injury had not been established as alleged, and the case was accordingly taken from the jury. On motion for new trial, I was convinced of my error in that regard upon the authority of *Marande v. Texas Pacific Railway Company*, 184 U. S. 173, 22 Sup. Ct. 340, 46 L. Ed. 487. While counsel for the defendant still maintain the soundness of their contention made at the first trial, they now rely chiefly in aid of their motion to set aside the verdict of the jury, and to grant a new trial, upon the showing of the plaintiff by his own testimony to sustain the defense of contributory negligence pleaded by the defendant. Their position is this: That which one knows cannot be intensified by communicating it to him. This argument is extremely plausible, but I have reached the conclusion that it is fallacious for two reasons:

First. To charge a boy 16 years old with contributory negligence because he knew the danger, it is necessary that he should have appreciated it in order to establish the defense. Thus it was expressed in *Spillene v. Missouri Pacific Railway Company*, 111 Mo. 555, 20 S. W. 293, as follows: "A boy may have all the knowledge of an adult respecting the dangers which may attend a particular act, but at the same time he may not have the prudence, thoughtfulness, and discretion to avoid them which are possessed by the ordinarily prudent adult person." This is the well-established rule. Great stress was laid upon the fact that the plaintiff testified that he knew it was dangerous to strike red hot cones. But it was not dangerous. The testimony was not in substantial conflict upon this question. It was shown to be dangerous to strike red hot matte cones in close proximity to water, or with wet steel. It was not dangerous to strike red hot slag cones under either condition. Therefore the testimony of the plaintiff must be taken in connection with the other testimony in the case, and with the qualification which he himself made in other parts of his testimony. To the contention made by counsel that the testimony of plaintiff shows that he fully appreciated the danger I cannot give my assent. True, the plaintiff was not able to stand up at all times against the skillful cross-examination of counsel, but he did repeat two or three times that he knew it was dangerous to strike hot matte cones when there was water there, and he said that he knew that he ought to break up only cold cones. The whole testimony, fairly considered, disclosed this state of affairs: The boy had observed generally certain occurrences around the yard. He had seen cones explode when coming in contact with water, and had seen the effect of cold, damp steel coming in contact with

hot metal. He had been permitted to go to work, however, without any instruction as to the danger attending such explosions. The master had allowed a boy of inexperience to observe for himself from the surroundings and apply his immature judgment in reasoning from cause to effect, without warning him of the danger which it is plain to my mind he did not fully appreciate. While counsel for the defendant have shown much ability in the presentation of their theory and have displayed much ingenuity and skill in cross-examining the plaintiff, I can but feel that the contention they make is technical, and that they have overlooked that phase of the case which requires the master to caution one of tender years not generally of danger, but to put him in possession of such facts as will enable him to appreciate it.

Second. While the rule is that one cannot deliberately enter a place of danger, or do an act which is manifestly dangerous and which in all reasonable probability will result in injury, yet that does not relieve the master from furnishing a safe place. The argument is made that the plaintiff knew that the cone which he struck must have been deposited between 11 and 1 o'clock, but the master is presumed to have known this also. Clearly the plaintiff was pursuing the work which he had been directed to do. The information that there was only one cone there, and that recently from the furnace, must have been equally in contemplation of law in the mind of the master as in the mind of the plaintiff. The cone did not appear to be hot. It was shown that it had cooled sufficiently to form a crust, so to speak, on the outside from one to two inches in thickness, and, of course, it was black. Plaintiff, then, acted on appearances, and it was a question for the jury to say, considering his age, experience, and the like, whether he was guilty of contributory negligence. Again, it was disclosed by the testimony of Sabin, the shift boss, that it was against the rules to put water at the particular place where those cones were being deposited. He said: "I kept the water out of it, yes, sir; and I always gave orders to that effect, too. Q. That there should be no water put in there? A. Yes, sir." It sufficiently appeared that the defendant had knowingly permitted the violation of this rule in relation to keeping this particular place dry, to such an extent as to establish a disregard of it. The plaintiff was justified in assuming that there would be no water there.

For these reasons, the motion for a new trial will be overruled.

(156 Fed. 649.)

BERNARD v. ABEL et al.

In re BERNARD.

(Circuit Court of Appeals, Ninth Circuit. October 14, 1907.)

No. 1,437.

1. JUDGMENT—CORRECTION AFTER TERM—AUTHORITY OF COURT.

It is within the power of a court to amend its record of a judgment at a subsequent term to prevent injustice through a mistake or inadvertence of the judge or counsel or the clerk, as by correcting the wording of an order of dismissal which by mistake did not conform to the motion on which it was based.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 594-599.]

2. SAME—NOTICE OF MOTION.

It is not a fatal objection to a nunc pro tunc order correcting a judgment on the ground of mistake that the motion therefor was not served as many days before the hearing as required by the rules of court in case of ordinary motions in suits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 622.]

3. BANKRUPTCY—INVOLUNTARY PROCEEDINGS—DISMISSAL BY PETITIONERS.

The only issues triable in a contested bankruptcy proceeding are those of insolvency and whether the alleged act of bankruptcy has been com-

mitted, and the court is not required to deny a motion by the petitioning creditors for a dismissal of the proceeding, if satisfied that it is made in good faith, because of other issues sought to be raised by the answer and which it has no power to try.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 136.]

Petition for Review and Appeal from the District Court of the United States for the Western Division of the Western District of Washington.

J. C. Cross, for appellant.

W. I. Agnew and G. C. Israel, for appellees.

Before GILBERT, Circuit Judge, and DE HAVEN and HUNT, District Judges.

HUNT, District Judge. On July 18, 1905, a petition in involuntary bankruptcy was filed in the District Court of the United States for the Western District of Washington, Western Division, by Veysey Bros., T. H. McKay, S. M. Heath, and W. H. Abel, praying that Joseph Bernard, appellant here, be adjudged a bankrupt under the bankruptcy laws of the United States. The principal ground for the petition in involuntary bankruptcy was that within four months preceding the filing of the petition Bernard, while insolvent, committed an act of bankruptcy, in that he transferred a portion of his property to one or more of his creditors, with intent to prefer such creditors over his other creditors, by executing and delivering to the Northwestern Lumber Company a bill of sale purporting to convey a certain logging outfit, and that the instrument of sale was made by Bernard, and accepted by the lumber company, for the purpose and with the intent to injure, delay, and defraud the creditors of Bernard. The petition in bankruptcy also alleged that, in a suit brought in the superior court of the state of Washington by Veysey Bros. against said Bernard, the personal property just described—that is, the logging outfit—was attached, and was thereafter claimed by the Northwestern Lumber Company, and that in an action duly brought by it a judgment was rendered that, by the bill of sale referred to, it became the owner of the said property, and that said attachment was thereby released, and that certain real estate had been attached, but that petitioners in bankruptcy, Veysey Bros., had released said attachments, and in their petition in involuntary bankruptcy had expressly waived any right under the said attachments. Bernard answered the petition, denying any indebtedness to the petitioners, denying insolvency, and denying that he had committed the act of bankruptcy set forth in the petition. He also set up that about March 31, 1905, Veysey Bros. brought suit against him upon the alleged indebtedness referred to in their petition, and that they had wrongfully caused an attachment to be issued in said suit, wrongfully levied upon certain of his property, and that the attachment was one in full force and effect when the petition in bankruptcy was filed, and that the claim of Veysey Bros. was a disputed and unliquidated one. Bernard objected to being declared a bankrupt, and prayed that the questions involved should be tried by jury.

Replication in due form was filed by the creditors who had petitioned in the proceeding in bankruptcy. On May 4th the petitioning creditors moved the court to dismiss the proceedings "without right to further prosecute." The motion recited that it was made for the reason that, since the filing of the petition, the bankrupt had been engaged in business, and was then in a position to pay, and had stated his willingness to pay, the debts of the petitioning creditors, on account of which the proceeding was instituted. On May 28th Bernard filed an affidavit objecting to the allowance of the motion for a dismissal of the proceeding. The objections of Bernard were based upon the following grounds: That the proceeding had been brought without just cause; that, when the petition was filed, he was and ever since had been engaged in a profitable business; that he had been and then was in a position to pay his debts to petitioners, and had stated his willingness to pay any sum or sums due, and owing by him to petitioners. He further set forth that he had paid certain of the petitioners amounts found due, and, furthermore, that, when the petition in bankruptcy was filed, there was pending in the superior court of the state of Washington a suit brought by Veysey Bros. involving a claim made the basis of the petition in bankruptcy; that the amount of the claim was in issue, but that he had expressed his disposition and willingness to pay to Veysey Bros. any amount justly due. He then set forth that he had been damaged by reason of the proceedings, and that, upon proper proceedings, he was willing that the matter be dismissed, but he insisted "that such dismissal be upon the answer of this affiant made and served herein, as aforesaid." Thereafter, on June 13th, the court entered a judgment of dismissal. The judgment recited that the matter came on regularly to be heard on motion of the petitioning creditors, "praying for a dismissal of this petition without right to further prosecute"; and thereupon it was ordered "that the petition herein be, and the same is, dismissed without right to further prosecute their claims." Thereafter, on September 19th, the petitioning creditors moved the court that the order of dismissal be modified so as to show that the right of the petitioning creditors to sue upon their claims in the state courts was preserved by limiting the right to further prosecute, referred to in said order, to bankruptcy proceedings. Notice of this motion to modify was served on September 19, 1906, upon the attorney for Bernard by leaving a copy with him in his office at Aberdeen, Wash. Thereafter, on September 26th, Bernard filed a special appearance and objections in the matter of the motion for the modification of the judgment of dismissal. He objected because the time designated in the notice of hearing of the petition for modification was not a rule day; that the notice of hearing was not sufficient under the rules of practice of the bankruptcy court. In his appearance, however, it was set forth that, if the special appearance was not sanctioned, he would, subject to exceptions, appear generally within the time allowed therefor by the law or by order of the court, and plead. The court overruled the objections, and denied the request for the allowance of time to appear generally and plead. Exceptions were allowed. Thereafter, on the same day, the court entered an order

reciting generally the proceedings upon the motion of the petitioners to modify the judgment of dismissal, and reciting, also, as follows:

"And it appearing to the court that the judgment of dismissal filed in this cause on June 13, 1906, was inadvertently entered, and by inadvertence did not conform to the motion to dismiss the action filed by the petitioners."

It was ordered that the judgment of dismissal of June 13, 1906, be vacated and expunged from the record; that the motion to dismiss the bankruptcy proceeding filed on May 4th should be granted, and ordering that said cause—that is, the bankruptcy proceeding—"is hereby dismissed without right to further prosecute for adjudication of bankruptcy under the national bankruptcy law for any of the causes alleged in the petition herein." It was further ordered that the judgment then rendered by the court "be entered nunc pro tunc as of date June 13, 1906." Bernard thereafter duly filed his bill of exceptions, and appealed to this court, praying herein for a review of the proceedings of the district court. The respondents herein demur to the petition for review upon the ground that it does not state facts sufficient to entitle the petitioner to a writ.

Rev. St. § 572, 26 Stat. 45, c. 65, § 6 [U. S. Comp. St. 1901, p. 464], provides as follows:

"The regular terms of the district courts shall be held at the times and places following, but when any of said dates shall fall on Sunday, the term shall commence on the following day. * * * Washington, Tacoma, first Tuesday in February and July."

The principal question involved is whether the court had authority to vacate the judgment of dismissal, and to make a judgment nunc pro tunc at the time and under the circumstances stated. Courts have the power to amend their judgments, upon proper showing, within a reasonable time, when no such change of circumstances has occurred as would make an amendment unjust to third persons or to the parties themselves. It happens sometimes, for instance, that applications to amend verdicts are granted even after error has been brought. Such amendments have often been allowed upon the judge's notes of the evidence at the trial, or upon other evidence clearly establishing the justice of the proposed amendments. This principle is distinctly stated in *Matheson's Adm'r v. Grant's Adm'r*, 2 How. 263, 11 L. Ed. 261. "It is a familiar doctrine," said the Supreme Court in *Insurance Co. v. Boon*, 95 U. S. 117, 24 L. Ed. 395, "that courts always have jurisdiction over their records to make them conform to what was actually done at the time; and, whatever may have been the rule announced in some of the old cases, the modern doctrine is that some orders and amendments may be made at a subsequent term, and directed to be entered, and become of record, as of a former term."

This power is one to make the record speak the truth. It is salutary, and enables courts to prevent injustice through mere mistake or inadvertence of the judge, or counsel, or the clerk. After the expiration of the term at which a judgment is rendered, there is no power in a court of law to amend a record in order to make it show that which did not take place, as to do this would be to exercise a revisory or appellate power of the court's own decisions; but, upon proper showing, the

power to correct a record by amending a judgment at a subsequent term is thoroughly well established. *Bank v. Moss*, 6 How. 31, 12 L. Ed. 331; 1 Freeman on Judgments, § 72; *Odell v. Reynolds*, 70 Fed. 656, 17 C. C. A. 317. The record in this case shows that the first judgment of dismissal did not conform to the motion for dismissal. It clearly appears that litigation between certain of the creditors and Bernard was pending in the state courts when the order of dismissal of the bankruptcy proceedings was applied for, and that the original motion to dismiss did not contemplate a judicial injunction by the bankrupt court against the pursuit of that litigation. It is evident that all that the court meant by its action was a dismissal of the proceedings in bankruptcy, without right to carry on such proceedings, and such only, any longer. But, by inadvertence, the order read as if it intended to cut the creditors off from carrying on their suits in other courts to recover certain claims. That the court, under the circumstances, was within its power when, upon motion, it made its record speak the exact truth by limiting the words expressing its meaning seems too plain to require further discussion.

There is no real merit in the point that notice of hearing of the motion to modify was not given for as many days before the hearing as the rules of the United States court in and for the district of Washington require in usual practice pertaining to motions. It is apparent that petitioner, Bernard, was in no way injured by the correction of the record. In his affidavit resisting the motion to dismiss the proceedings, after stating that they had been instituted without good cause, he alleged general damages, and stated that upon "proper proceedings" he was willing that the matter might be dismissed, but insisted "that such dismissal be upon the answer of this affiant made and served herein as aforesaid." He expressly alleged payments to certain of the petitioning creditors since the petition in bankruptcy had been filed, and admitted the pendency of litigation with certain other petitioning creditors in the state court, involving a claim of Veysey Bros., which claim was the basis of the petition in bankruptcy, and admitted also a willingness to pay such creditors "the amount justly due and owing." The bankruptcy court, however, was not justified in retaining the bankruptcy proceeding in order that it might determine the issues still pending and undetermined in the state court, while it was wholly beyond its power to have tried the question of damages for a wrongful institution of bankruptcy proceedings, inasmuch as the only issues triable upon a contested bankruptcy case are those of insolvency and whether the alleged act of bankruptcy has been committed. Bankr. Act, § 19, subds. "a," "b" (Act July 1, 1898, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]); Collier on Bankruptcy, p. 257.

Under the circumstances, therefore, if petitioning creditors wished to dismiss their petition in bankruptcy, and to try their suit in the state court, they had a right to move for a dismissal of the bankruptcy matter, and, if the court believed they were in good faith, to obtain such an order.

The petition for a writ will be dismissed.

(156 Fed. 654.)

AACHEN & MUNICH FIRE INS. CO. v. MORTON.

(Circuit Court of Appeals, Sixth Circuit. November 15, 1907.)

No. 1,683.

1. LIMITATION OF ACTIONS—COMPUTATION OF PERIOD OF LIMITATION—ACCRUAL OF RIGHT OF ACTION.

The statute of limitations begins to run from the time a right of action accrues for a breach of duty or contract or for a wrong, without regard to the time when actual damage results.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 217, 218.]

2. SAME—BREACH OF CONTRACT.

An insurance company undertook to cancel a policy in accordance with its terms by giving notice and returning the unearned premium. The policy having been lost, a lost policy receipt was given, signed by the owner of the property and mortgagees, to whom the policy was made payable, by which they agreed that, if the policy was found, it would be surrendered. The property was burned, and the policy, having been found, was assigned by the mortgagees to a third person, who recovered thereon against the company. *Held*, in an action by the company to recover the amount so paid out by it from one of the mortgagees, based on an alleged breach of the cancellation agreement, that such breach occurred and plaintiff's cause of action accrued at the time the policy was assigned by defendant in violation of his agreement to surrender it, and that the statute of limitations commenced to run at that time.

In Error to the Circuit Court of the United States for the Southern Division of the Western District of Michigan.

The Aachen & Munich Fire Insurance Company, a foreign corporation doing business in Michigan, insured against loss by fire a certain hotel building and furniture therein situated in that state, and owned by a Michigan corporation known as the "St. Joseph Hotel Company." This contract of insurance bore date of July 17, 1897, and covered the risk for one year, unless sooner terminated by cancellation, as provided by the policy. Attached to the policy was a slip providing "loss, if any, payable to Andrew Crawford and John H. Graham, as their interest may appear." These persons were at the time mortgagees and stockholders. February 28, 1898, notice was given to the hotel company and to said Crawford and Graham of an intention to cancel the policy. On March 3, 1898, the unearned part of the premium was accordingly returned to the hotel company, but the policy was not actually delivered up, because it had been lost or misplaced. In consequence of this fact an agreement in the following words and figures was made and delivered to the insurer:

"Policy No. 61,251.

Return Premium, \$17.75.

"Agency at Benton Harbor, State of Michigan.

"In consideration of seventeen and 75-100 dollars to us paid, the receipt whereof is hereby acknowledged, we hereby surrender, release and relinquish all our rights, title and interest in policy No. 61,251 of the Aachen and Munich Insurance Company of Aix-la-Chappelle, issued at its Benton Harbor Agency, and all advantages to be derived therefrom and the said policy having been lost or mislaid, we agree to make no claim whatever for any loss or damage on which the said company would be liable under said policy, and to return said policy, (if the same should be found) to the said company forthwith, and without further compensation and we certify that said policy has not been assigned or transferred in any manner whatsoever.

"Dated March 3, 1898.

Hotel St. Joseph Company,

"Per S. J. Morton, Assured.

"J. H. Graham,

"A. Crawford,

"Mortgagees."

On or about July 10, 1898, the hotel was destroyed by fire. On January 13, 1898, the policy, which in the meantime had been found, was assigned by the hotel company and by Crawford and Graham to one H. G. Stone, a citizen of Illinois. On January 15, 1898, Stone, the assignee, brought suit in a circuit court of the state of Illinois against the insurer in the name of Crawford and Graham for the use of said Stone. The insurance company appeared and set up the cancellation of the policy as a defense, and upon a trial there was a judgment for the defendant. The cause was thereupon taken by appeal prayed and allowed the said Graham, Crawford having died, to the Appellate Court of the First District of the state of Illinois, which court reversed the judgment of the circuit court and entered judgment against the insurance company for the full amount, with interest and costs. This judgment was affirmed by the Supreme Court of the state of Illinois on October 25, 1902. The judgment was thereupon paid, together with costs and the expenses of the litigation. On January 17, 1906, this suit was started against the said Graham, assignee of the said policy and plaintiff in the said Illinois suit, to recover from him the amount of the said Illinois judgment, together with costs, interests, and expenses of the said litigation. The opinions of both the Illinois courts, by agreement, are made a part of each count in the declaration. Graham meantime died, and the suit was revived against his administrator. A demurrer to the plaintiff's amended declaration was sustained and judgment rendered for the defendant. From this judgment, the insurance company has sued out this writ of error.

Arthur Webster and Willard Kingsley, for plaintiff in error.

G. M. Valentine, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges

LURTON, Circuit Judge (after stating the facts as above). Two questions have been argued as defenses arising under the demurrer to the plaintiff's declaration: First, the effect of the judgment of the Illinois court as *res adjudicata*; and, second, the Michigan statute limiting personal actions to six years. These in their order.

The policy of insurance upon which Graham's suit for the use of Stone was brought contained the usual provision that "this policy shall be canceled at any time at the request of the insured, or by the company, by giving five days' notice of such cancellation," etc. The defense made to the Illinois suit was that the policy had been effectually canceled before any loss had occurred. The Illinois Appellate Court found as a fact that both Graham and Crawford had an insurable interest in the property insured as the property of the St. Joseph Hotel Company, both as mortgagees and as stockholders, and that their interest in the policy as stockholders had not been canceled or surrendered, but had been effectually transferred after loss to Stone, the beneficial plaintiff in that suit. Upon this finding that court gave judgment against the insurance company for the full amount of the policy with interest and costs. Upon a writ of error to the Supreme Court this judgment was affirmed. This affirmance, from the opinion of that court, appears to have been based upon the fact that findings of the Appellate Court had been made a part of the judgment of that court, thereby leaving open for review no question except whether upon the facts so made a part of the judgment the law had been correctly applied. Upon the record, as made up, that court also held that no propositions of law had been saved under the practice of the court which would enable it to question the propositions of

law held by the Appellate Court in behalf of the plaintiffs in the lower court. Thus finding its hands tied, the Supreme Court affirmed the judgment of the Appellate Court against the present plaintiff in error, the Aachen & Munich Fire Insurance Company. *Aachen & Munich Fire Ins. Co. v. Crawford*, 199 Ill. 367, 65 N. E. 134. Unless the plaintiff in error can escape the effect of this Illinois judgment as an adjudication, it is clear that the insurance company cannot recompense itself by a recovery against Graham's administrator in an action which is necessarily grounded upon the proposition that the recovery in the Illinois court against it was wrongful and erroneous. In short, it was adjudged in that action, it being one in which Graham was an actor on one side and the insurance company upon the other, that Graham's interest in the hotel as a stockholder was insured, and that the cancellation agreement did not effectually cancel the policy as to that interest. The present action is in direct contravention of that adjudication.

But the learned attorneys who now represent the insurance company say that the judgment in that case is not conclusive here under the averments of the amended declaration, which, they say, sets forth a state of facts in respect to the cancellation agreement which make an issue which was not presented by the pleadings in the Illinois case, and thus not then adjudged. These new facts are, in substance, that the parties intended that the stockholder's interest of Graham and Crawford should be canceled and surrendered, and that if the cancellation agreement, called the "Lost policy receipt," did not plainly express this intent, it is because it is defective in form and fullness. It is now averred that Graham actively undertook to fully cancel and effectually surrender any benefit under said policy in every character, and that he affirmed and represented that the receipt given for the lost policy "was in manner and form a good, valid, and efficient surrender, discharge, and cancellation of said policy and loss slip attached thereto." It is further alleged that that contract or receipt was delivered by him to the company "with the intent to cancel and release all the interests which he had or claimed to have" in the policy or lost slip.

Assuming, as we must, for the purposes of this case, that the "lost policy receipt" did not operate in terms as a cancellation and surrender of the policy in so far as that policy protected Mr. Graham's interest as a stockholder, a very grave question is presented as to whether it can be varied or contradicted by parol evidence of the intent and purpose of the parties or their antecedent declarations; its execution and delivery not being denied. *Assurance Company v. Building Association*, 183 U. S. 308, 349, 361, 22 Sup. Ct. 133, 46 L. Ed. 213, has greatly narrowed the limits within which such evidence is available when the written instrument is unambiguous and actual fraud in the execution or delivery is not relied upon. But, passing the question without express decision, we think that relief must be denied, because plaintiff's right of action arose more than six years before this suit was begun. A right of action accrues whenever such a breach of duty or contract has occurred, or such a wrong has been sustained, as will give a right to then bring and sustain a suit. That

the statute begins to run from the time that a right of action accrues, without regard to when the actual damage results, is well settled. 26 Cyc. 1065, 1069, 1116, and cases there cited: *Wilcox v. Plummer*, 4 Pet. 172, 7 L. Ed. 821.

If an act occur, whether it be a breach of contract or duty which one owes another or the happening of a wrong, whether willful or negligent, by which one sustains an injury, however slight, for which the law gives a remedy, that starts the statute. That nominal damages would be recoverable for the breach or for the wrong is enough. The fact that the actual or substantial damages were not discovered or did not occur until later is of no consequence. The act itself, which is the ground of action, cannot be legally separated from its consequences. Were this so, successive actions might be brought in many cases of contract and tort as the damages developed, although all the consequential injuries had one common root in the single original breach or wrong. This would in effect nullify the statute.

There is a class of actions for consequential damages which are distinguishable from the class to which we refer and from the one at bar. The breach of duty or other wrongful act may or may not be legally injurious to the plaintiff until he has suffered some consequence therefrom. Thus a railway may be operated without the exercise of statutory precautions intended to safeguard the public. But, until one has sustained some injury in consequence, he has no right of action. It is the duty of a municipality to maintain its streets so that they may be safely used by the public. But the mere fact that a street is in a dangerous condition will not give a right of action to every one who chooses to sue. It is only when some injury has occurred as a consequence that the statute begins to run against the injured person's right of action. One may maintain a dangerous wall along a public street, but no individual right of action against him will arise until some injury shall result. If one has the legal right to take the coal or other mineral below the surface of premises occupied by another, he owes that person the duty of doing it in such manner as will not disturb his enjoyment of the surface. But until the enjoyment of the surface premises is interfered with no right of action arises for the breach of this duty. This last illustration is from the case of *Bonomi v. Backhouse*, 9 H. L. Cases, 305, and the decision in that case went upon the ground that the cause of action did not arise until the enjoyment of the surface was affected by the falling in of the ground. The surface owner was not bound to bring his suit when the mischief was done which ultimately led to the injury of his rights, because no legal injury had occurred until there was some interference with the enjoyment of his surface estate. The case of *Smith v. City of Seattle*, 18 Wash. 484, 51 Pac. 1057, 63 Am. St. Rep. 910, is to the same effect. The case of *State v. McClellan*, 113 Tenn. 616, 625, 85 S. W. 267, has been relied upon by the plaintiff in error as an authority holding that it is the occurrence of actual damage which starts the statute. That was an action upon the official bond of a register of deeds, etc., for damages resulting from his failure to correctly register a deed placed in his hands for that pur-

pose by the plaintiff. It was held that the statute of limitations did not begin to run until the plaintiff had sustained some injury in consequence. But this was placed upon the well-recognized distinction between the liability of a public official for a breach of official duty and the right of action which may arise between persons having only private relations with each other when there has been a breach of some contract or duty which one personally owes to the other. The Tennessee court, speaking by Judge Shields, said:

"Public officers are not liable for a breach of official duty to an individual unless he can show that in the public duty was involved a duty to himself as an individual, and that he has suffered a special and peculiar injury, not common to the general public. In other words, without special injury, the wrong is to the public only, and punishable by indictment or removal from office, or both. The plaintiff, in an action against a public officer for a breach of a duty primarily due to the public, must show both the breach of an official duty, in the correct discharge of which he was interested, and the special resultant injury to himself. All these elements must be present. This rule is necessary to prevent public officers from being annoyed and harassed by groundless actions and in the promotion of good public services. 23 A. & Eng. Ency. of Law, 379, 380; Mechem on Public Officers, §§ 670-674. Therefore a right of action against a public officer growing out of a breach of official duty involving individual rights is not complete and does not accrue until the happening of a consequential injury resulting proximately from the breach."

To the same effect is the case of *Moore v. Juvenal*, 92 Pa. 490. *People v. Cramer*, 15 Colo. 159, 25 Pac. 302, *Steel v. Bryant*, 49 Iowa, 117, and *Bank of Hartford v. Waterman*, 26 Conn. 324, were similar to the Tennessee case, and stand upon the distinction already stated, being actions upon the official bonds of public officers for neglect of official duty resulting in loss to the plaintiffs. The later Iowa case of *Russell v. Abstract Co.*, 78 Iowa, 216, 42 N. W. 654, 4 L. R. A. 536, illustrates the distinction. That was an action against a private abstract company. It was held that the statute began to run when an erroneous abstract was furnished, although the damage did not result until later. To the same effect as the case last cited are *Kinnison v. Carpenter*, 9 Bush (Ky.) 606, and *Carpet Co. v. Dornan*, 64 Mo. App. 25.

The ground of the present action is the wrongful assignment of the policy of insurance to Stone. That act was in breach of his express agreement to deliver same to the company "forthwith" when it should be found. That act was also in direct contravention of his implied obligation, in view of the averments of the declaration in respect of the actual intent of the parties as to the full cancellation of the policy and his "affirmation and representations" as to the full effectiveness of the "lost policy receipt" as a cancellation of every interest which he claimed. Everything which followed was the plain result or consequence of that act, whether we treat it as a mere breach of contract or a tortuous and wrongful act in view of his obligations and relations to the insurance company. A right of action then arose. That the damages immediately accruing may have been purely nominal does not alter the case. For the nominal damages the plaintiff might have maintained its suit. Actual damages accrued when suit was actually brought upon the policy for the company was then com-

pelled to incur the expense of a defense, and, when judgment was finally rendered for the amount of the policy with interest and costs, the full extent of the injury done by the act of assignment was determined. The act of wrongfully assigning the policy is the cause of action, or the plaintiff has stated none, and the damages which resulted cannot be legally separated from the act which constituted the legal wrong which lies at the foundation of this suit.

The case of *Wilcox v. Plummer*, 4 Pet. 172, 181, 7 L. Ed. 821, is not only a leading case, but an authoritative one. That was an action in assumpsit to recover the amount of a loss sustained by the negligent and unskillful conduct of a litigation. A promissory note was placed in the attorney's hands for collection by suit against the maker and indorser. The maker alone was sued. Judgment had. He proved to be insolvent. Suit was then brought against the indorser. This action was nonsuited for a negligent misnomer of the plaintiff. By the termination of this action the statute had run in favor of the indorser. The question in the case was whether the statute of limitations commenced running when the error was committed in the commencement of the action against the indorser, or only when the actual damage was sustained by the loss of the debt through the bar of the statute in favor of the indorser. The court held that the statute began to run when the negligent act of the attorney was committed. Among other things, the court said:

"When the attorney was chargeable with negligence or unskillfulness, his contract was violated, and the action might have been sustained immediately. Perhaps, in that event, no more than nominal damages may be proved, and no more recovered; but, on the other hand, it is perfectly clear that the proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict. If so, it is clear the damage is not the cause of action. This is fully illustrated by the case from *Salkeld and Modern*, in which a plaintiff, having previously recovered for an assault, afterwards sought indemnity for a very serious effect of the assault, which could not have been anticipated, and of consequence could not have been compensated in making up the verdict.

"The cases are numerous and conclusive on this doctrine. As long ago as the 20th Ellz. (Cro. Ellz. 53), this was one of the points ruled in the *Sheriffs of Norwich v. Bradshaw*. And the case was a strong one; for it was altogether problematical whether the plaintiffs ever should sustain any damages from the injury. The principle has often been applied to the very plea here set up, and in some very modern cases. That of *Battery v. Faulkner*, 3 B. & Ald. 288, was exactly this case; for there the damage depended upon the issue of another suit, and could not be assessed by a jury until the final result of that suit was definitely known. Yet it was held that the plaintiff should have instituted his action, and he was barred for not doing so. In the case of *Short v. McCarthy*, which was assumpsit against an attorney, for neglect of duty, the plea of the statute was sustained, though the proof established that it was unknown to the plaintiff until the time had run out. And the same point is ruled in *Granger v. George*, 5 B. & C. 149; in both cases the court intimating that, if suppressed by fraud, it ought to be replied to the plea, if the party could avail himself of it. In *Howell v. Young*, the same doctrine is affirmed, and the statute held to run from the time of the injury, that being the cause of action, and not from the time of damage or discovery of the injury."

Judgment affirmed.

(156 Fed. 660.)

KOBUSCH v. HAND.

(Circuit Court of Appeals, Eighth Circuit. October 19, 1907.)

No. 2,479.

1. BANKRUPTCY—"CREDITORS"—SURETY OR INDORSER.

A surety or indorser for a bankrupt is a creditor within the meaning of Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418].

2. SAME—VOIDABLE PREFERENCE—PAYMENT FOR BENEFIT OF SURETY.

Where the president of a corporation was an indorser on its notes given to a bank, and with knowledge of its insolvency and within four months prior to its bankruptcy caused it to pay the notes with intent to relieve himself from liability and to secure an advantage over other creditors, a preference was given which may be recovered from him by the trustee under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1907, p. 1031].

In Error to the District Court of the United States for the Eastern District of Missouri.

B. Schnurmacher and William A. Kinnerk, for plaintiff in error.
Warren Hilton, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. The trustee in bankruptcy sued Kobusch to recover the amount of a voidable preference claimed to have been received from the bankrupt, and obtained judgment which this writ of error is brought to review. The bankrupt was a manufacturing company, and Kobusch was its president. It had executed to a bank four notes aggregating \$4,800 upon which Kobusch was an indorser for its accommodation. Within four months of the filing of the petition in bankruptcy, and whilst the company was insolvent, he, as president, caused it to pay the notes to the bank. The trial court found from the evidence that, when the notes were paid, he had reasonable cause to believe his company was insolvent, that the payment was made with intent on the part of the company to give a preference, and that he, Kobusch, intended to secure such preference. The question is whether Kobusch received such a preference as may be recovered from him under the preference clauses of Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1907, p. 1031].

There is no doubt that, as abstractly defined by section 60a, a preference was given by the bankrupt. Nor in view of the findings of the trial court, which are not disturbed by the contents of the bill of exceptions, is there doubt that Kobusch was benefited by being discharged from his obligation to the bank as surety or indorser upon the notes of the bankrupt. Section 60b provides:

"If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall

be voidable by the trustee, and he may recover the property or its value from such person."

There is a significant resemblance between the language of this section and that of the corresponding sections of Act March 2, 1867, c. 176, 14 Stat. 517. Section 35 (page 534) of the act of 1867 provided that if any person insolvent or in contemplation of insolvency, within the period limited, with a view to giving a preference to any creditor or person having a claim against him, or who is under any liability for him, makes any payment, etc., the same shall be void and the assignee may recover the property or the value of it from the person so receiving it or so to be benefited. Section 39 (page 536) of the same act also provided for the recovery of preferences given to persons under liability for the bankrupt "as indorsers, bail, sureties or otherwise." It is quite clear that in passing the existing act Congress intended to adopt the substance of the prior provisions upon this subject, and in doing so to employ terms more concise, but equally as comprehensive. The act of 1867 was construed in *Bartholow v. Bean*, 18 Wall. 635, 21 L. Ed. 866. In that case the bankrupts when insolvent paid their note, indorsed by one Wilcox, which they had discounted with their bankers. Shortly afterwards bankruptcy proceedings were instituted, and the assignee who was appointed sued the bankers, not Wilcox, the indorser, to recover the payment as a voidable preference. In treating of the relation to the case of the fact that the indorser was solvent and the right of the bankers to refuse payment from the bankrupts without danger of losing their claim upon the indorser, the court said:

"The statute in express terms forbids such preference, not only to an ordinary creditor of the bankrupt, but to any person who is under any liability for him; and it not only forbids payment, but it forbids any transfer or pledge of property as security to indemnify such persons. It is therefore very evident that the statute did not intend to place an indorser or other surety in any better position in this regard than the principal creditor, and that, if the payment in the case before us had been made to the indorser, it would have been recoverable by the assignee. If the indorser had paid the note, as he was legally bound to do, when it fell due, or at any time afterwards, and then received the amount of the bankrupt, it could certainly have been recovered of him. Or if the money had been paid to him directly, instead of the holder of the note, it could have been recovered, or if the money or other property had been placed in his hand to meet the note or to secure him, instead of paying it to the bankers, he would have been liable."

If Wilcox, like Kobusch in the case before us, had occupied a position of power and control over the affairs of the bankrupts with authority to direct their business acts, and by virtue thereof had caused the preferential payment to be made to the holders of the note with intent to relieve himself from liability, it is difficult to perceive how he could have escaped liability under the statute as so construed. *Landry v. Andrews*, 22 R. I. 597, 48 Atl. 1036, arose under the present act. Andrews had indorsed a note of the bankrupts given to a bank. Within four months of the commencement of the bankruptcy proceedings, and when insolvent, the bankrupts paid to the bank the amount of the note, thereby discharging it and relieving Andrews from liability. Andrews, with knowledge of the insolvency

of the bankrupts, directed them to pay the note in order that he would be benefited, and, when the payment was made, he had reasonable cause to believe that it was intended thereby to give him a preference over other creditors. The trustee sued Andrews to recover the preference. The Supreme Court of Rhode Island held that the declaration which exhibited the foregoing facts was sufficient to entitle the trustee to recover. The case is like the one at bar in all substantial particulars.

It is contended that no one but a creditor can receive a preference, and that an indorser or surety is not a creditor. But is it true that an indorser or surety is not a creditor within the meaning of the bankruptcy act? The contrary was held in *Swarts v. Siegel*, 117 Fed. 13, 54 C. C. A. 399. Siegel & Bro. were accommodation indorsers upon the notes of the bankrupts given to a bank. Within the four months before the bankruptcy proceedings, and when insolvent, the bankrupts made partial payments on the notes. After the adjudication and selection of a trustee, Siegel & Bro., having paid to the bank the balance due on the notes, presented claim for allowance. We held that their claim should not be allowed until they had surrendered the preference received by the bank, one of the grounds being that their relation as sureties to the bankrupts constituted them creditors. It was said:

"An indorser, an accommodation maker, or a surety on the obligation of a bankrupt is a creditor under the act of 1898, and a payment on such an obligation by the principal debtor while insolvent to the innocent holder of the contract within four months before the filing of the petition for adjudication in bankruptcy will constitute a preference which will debar the indorser, accommodation maker, or surety from the allowance of any claim in his favor against the estate of the bankrupt unless the amount so paid is first returned to that estate."

It is almost an imperceptible step in advance of this decision, but a logical and reasonable one, to say that where the surety is the president of the bankrupt, and with knowledge of its insolvency directs the payment to the holder of the obligation with intent to relieve himself from liability and to secure an advantage over other creditors, a preference arises which may be recovered from him by the trustee.

The judgment is affirmed.

(156 Fed. 662.)

SCHLOSS v. A. STRELOW & CO. et al.

(Circuit Court of Appeals, Third Circuit. November 12, 1907.)

No. 6.

BANKRUPTCY—INVOLUNTARY PROCEEDINGS—TRIAL OF ISSUES ON PETITION.

An issue as to the insolvency of an alleged bankrupt involves as elements the questions of the amount of his indebtedness and the fair valuation of his property, both of which he is entitled to have determined by a jury; and the court cannot make a preliminary finding as to the validity and amount of the claims of certain creditors which will be conclusive on the jury upon the trial of such issue.

In Error to the District Court of the United States for the Middle District of Pennsylvania.

For opinion below, see 149 Fed. 907.

Edward W. Thayer, for plaintiff in error.

R. W. Rynier, for defendants in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

DALLAS, Circuit Judge. On March 9, 1906, a petition was filed wherein it was prayed that Henry P. Schloss might be adjudged a bankrupt. He answered that he had not committed the act of bankruptcy alleged, that he was not insolvent, and that he was not indebted to the petitioners; and he demanded a trial by jury. On August 7, 1906, the petitioners moved the court "to limit the issue, after setting down the case for hearing before a jury, for the determination of the insolvency of the alleged bankrupt, and the act of bankruptcy alleged in said petition"; and, on the same day, this motion was granted. Subsequently a decree was entered, as follows:

"Now, September 29, 1906, the above case having been put at issue by petition and answer filed, and the case having been heard by the court on the question whether or not the petitioning creditors in this case were the creditors of Henry P. Schloss, the alleged bankrupt, it is now ordered, adjudged, and decreed by this court that the said Henry P. Schloss is indebted to, and purchased goods, wares, and merchandise from, the said petitioning creditors, to wit, A. Strelow, William A. Leggett & Co., Williamson Bros., and the Honesdale Shoe Company, to the amounts set forth in the petition filed in this case."

After the making of this decree, several persons, firms, and corporations united in a petition wherein it was stated that they were creditors of the alleged bankrupt in the respective amounts therein specified, but that he denied that he was indebted to them, and intended "to set up said defense on the trial of said case"; and they prayed to be permitted to intervene, in order that they might "make a proper presentation of their respective claims." This petition was followed by answer and replication, and thereupon there was a decree as follows:

"Now, January 30, A. D. 1907, on the issue raised by the petition of Harris & Brody, Cohen & Lange, J. A. Scriven & Co., Fuld Bros., Julius Franklin, Hirsch Bros. Co., John N. Hines & Co., Samuel Greenstein, Ascher & Abramson, A. Kraner & Co., J. R. Palmenberg & Sons, Wright & Wright, S. W. Korn Sons & Co., Emil Messner, Modern Cloak & Suit Co., S. Steinfeld & Co., Empire Frame & Art Co., Sulla & Kurtz, I. Brozen, Zins & Rossner, and Revealon Freres, requesting that as creditors of the alleged bankrupt they be admitted as additional petitioners, and the answer of the respondent denying that they are creditors, the court, after due hearing, sustains the petition, adjudging that the petitioners are creditors of the bankrupt, and that they are entitled to come in as prayed."

On February 28, 1907, there was a jury trial as to both insolvency and the act of bankruptcy; but the assignment of errors concerns only the issue as to insolvency, and the single point presented by the several specifications is whether, for the trial of that issue, the orders of September 29, 1906, and of January 30, 1907, had conclusively determined the validity and amount of the claims of the petitioners, original and intervening. The case was tried and decided upon the theory that they had, and in this we think there was error. The

precise question, as defined by the bankruptcy act (Act July 1, 1898, c. 544, cl. 15, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3420]), was whether the property of Schloss would, "at a fair valuation, be sufficient in amount to pay his debts," and for the solution of that question it was quite as needful to ascertain the amount of his debts as the value of his property. These elements were both inherent in "the question of his insolvency." There was no separate issue as to his indebtedness. That was matter of evidential fact, and the plaintiff in error was entitled to a finding of the jury upon it, notwithstanding its supposed predetermination by the court.

The judgment is reversed, and a new trial is directed.

(156 Fed. 684.)

ANDREW et al. v. GLOBE ELEVATOR CO. et al.

(Circuit Court of Appeals, Seventh Circuit. May 18, 1907.)

No. 1,318.

INJUNCTION—PRELIMINARY INJUNCTION—REVIEW ON APPEAL.

A preliminary injunction, restraining the enforcement of a state grain inspection law in respect to interstate shipments pending a final hearing as to its constitutionality, *held* not improvidently granted upon the facts shown, and sustained, without consideration of the case on its merits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 305, 306.]

Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

For opinion below, see 144 Fed. 871.

L. K. Luse, for appellants.

Ralph Whelan, C. H. Crownhart, and J. A. Murphy, for appellees.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

PER CURIAM. This is an appeal from an interlocutory order, which restrains, pending the final hearing, the appellants from interfering with the business of the appellees under color of a Wisconsin statute, which the appellees claim, on the state of facts averred by them, violates their rights under the commerce clause of the federal Constitution. The appellants have not satisfied us that the order staying the hands of appellants, pending a final hearing, was entered improvidently. We do not at this time consider any of the questions which go to the ultimate merits of the case, which were pressed upon our attention at this hearing.

The order appealed from is affirmed.

(156 Fed. 721.)

NURNBERGER v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1907.)

No. 2,527.

1. PERJURY—INDICTMENT FOR SUBORNATION—SUFFICIENCY.

An indictment for subornation of perjury in procuring another to make a false oath or affidavit before the receiver of a land office to secure an entry of land, which avers that such oath or affidavit was made in support of "a certain application in writing to enter under the homestead laws of the United States, subject to entry at said land office," certain land described, is sufficient after verdict as showing that the land described was at the time public land of the United States subject to homestead entry at such land office.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, § 95.]

2. INDICTMENT—OBJECTIONS TO SUFFICIENCY—HOW TAKEN.

Objections to the sufficiency of an indictment cannot be raised by objecting to the introduction of any evidence thereunder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 462.]

3. PERJURY—HOMESTEAD ENTRY—FALSE OATH TO SUPPORT.

To support an indictment for subornation of perjury based on the alleged procurement of the making of a false affidavit or oath before the receiver or register of a land office in support of an application to enter land under the homestead law, it is not essential that the affidavit should have been subscribed as well as sworn to before such officer.

4. SAME—TRIAL—EVIDENCE.

On the trial of such an indictment, the tract book kept by the register of the land office is admissible in evidence to establish the fact that the lands to which the application related were public lands subject to homestead entry at such office, and it is competent for the register as a witness to explain the meaning of abbreviations used therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, §§ 113, 114.]

5. CRIMINAL LAW—EVIDENCE—DEPARTMENT REGULATIONS.

A general regulation promulgated by the General Land Office respecting homestead entries of public land, for the government of the officers of local land offices, pursuant to authority given by Rev. St. § 2478 [U. S. Comp. St. 1901, p. 1586], becomes a part of the body of public laws of which the courts take judicial notice, and, where such a regulation was pertinent to the issue as to the criminal intent of a defendant charged with a criminal offense under the land laws as corroborating his testimony as to his understanding of the requirement of the law, by showing that such understanding was in accordance with that of the Land Department until after the alleged offense, he was entitled to have such regulation placed before the jury as a matter of evidence, and its exclusion was error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 706.]

Judicial notice of public laws and regulations, see note to 44 C. C. A. 4.]

6. SAME—APPEAL—REVIEW—DISCRETION OF COURT—PERMITTING LEADING QUESTIONS.

While the permitting of leading questions is a matter resting in the sound discretion of the trial court, allowing a district attorney in a criminal case to ask questions of his own witnesses, who are not unwilling or unfriendly, which are leading and in a form to suggest the answer de-

sired and call for a mere conclusion of the witness, is an abuse of discretion, and is prejudicial error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3064.]

7. PERJURY—TRIAL FOR SUBORNATION—EVIDENCE.

On the trial of a defendant charged with subornation of perjury in procuring homestead entrymen to make the required oath that the entry was not made for the benefit of any other person, when in fact they had agreed to convey the land to defendant for a stipulated price as soon as they obtained title, it was error to refuse to permit defendant to testify that he made no such agreements, but that the agreements actually made, as he understood them, left the conveyance optional with the other parties or to other facts, which tended to show that his act was not willful nor corrupt, as required by the statute to constitute the crime charged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, § 115.]

8. SAME—INSTRUCTIONS.

Instructions, given on the trial of a defendant charged with subornation of perjury in procuring homestead entrymen to make false oaths, held erroneous and misleading, in that they authorized the jury to convict in case they found that any statement made by affiants in their affidavits was false and was intentionally sworn to, when there was evidence tending to show that some of the recitals in the affidavits respecting the intention to reside on and improve the land as affiants understood the law were not applicable to their entries, and that their act in swearing to the same was not therefore willful and corrupt, as required by Rev. St. § 2291, as amended by Act March 3, 1877, c. 122, § 2, 19 Stat. 404 [U. S. Comp. St. 1901, p. 1391], to constitute the crime of perjury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, § 135.]

Hook, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of North Dakota.

Charles E. Wolfe and W. S. Lauder, for plaintiff in error.

B. D. Townsend, Asst. U. S. Atty. (Patrick H. Rourke, U. S. Atty., on the brief).

Before SANBORN and HOOK, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. The plaintiff in error (hereinafter for convenience designated the defendant) was a Union soldier who served through the Civil War, and at the time of the indictment and trial he was 67 or 68 years old. After the War he lived at Bowling Green, in the state of Ohio. In 1879 he moved to Richland county, N. D., where he acquired lands from the government under the homestead, timber culture, and pre-emption laws. In 1900 he visited Ward county, N. D., where one of his sons had located in business. There was a large amount of public land in that vicinity where Minot, the local land office, is located. In the spring of 1900 he went to Bowling Green, Ohio, to visit his wife, who had been there some months on account of sickness. While there he met a number of his former comrades of the army, and they discussed the subject of locating homesteads in said Ward county. He obtained a power of attorney from a number of these soldiers to make entries for them under the homestead laws. Being advised that such powers of attorney were not permissible for

such purpose, he consulted with an attorney respecting the legality of contracts with soldiers concerning lands to be acquired under the homestead laws. The trend of this advice was that he could make contracts with them under which he could furnish the money to defray their expenses in making such entries and the necessary improvements on the lands, and that they might or might not, at their pleasure, convey the lands to him after they had obtained the title; but he could not make a contract that they should enter the lands for his use and benefit. He took several parties of these soldiers and the widows of deceased soldiers out to Ward county, where they made affidavits of application for such lands and effected such entries. He paid all the expenses of these trips, and for the entries, and constructed what are called "shacks" on the lands.

In the fall of 1903 he went to Ohio and organized the last party, composed of 12 widows of old soldiers, who made the entries in question. A form of contract was drawn up by a Mr. Comstock, a lawyer and comrade of the defendant, a resident of the locality in Ohio where these homesteaders lived, to be signed by them and the defendant, the substance of which was that the applicant agreed to go to the United States land office at Minot, N. D., and make due and legal entry upon lands selected for them by the defendant under the provisions of the homestead laws, and that the applicant would duly appear and make final proof and perfect title to the land, and when the title was perfected they agreed to sell the land to the defendant for the sum of \$200, plus the expenses of one trip to the land office and return to Ohio; the \$200 to be paid upon delivery of the deed. The defendant was to select and locate the land and make the improvements on the same before final proofs; the locator agreeing that until such deed was delivered as aforesaid, the defendant should have a prior lien upon the land for improvements so made and for money advanced for traveling expenses. This contract, it is conceded, was nonenforceable. The tenth count of the indictment was based upon an entry made by one Hall in 1902, under a claimed parol understanding with the defendant.

The defendant was indicted May 29, 1905, for subornation of perjury in procuring said entrymen of 1903 to make false affidavits before the register of the land office to secure said locations. The indictment contained 13 counts. Verdicts of guilty were returned on counts numbered 2, 3, 6, 7, 8, 9, and 10, and he was acquitted on the other counts. He was sentenced to the South Dakota penitentiary for a term of one year and to pay a fine of \$300.

The first error assigned goes to the sufficiency of the indictment, based on the following objections: (1) That the indictment fails to charge that the land described at the times when the affidavits in question were made were public lands of the United States, over which the register and receiver of the land office at Minot had jurisdiction; (2) that the allegation "subject to entry at said land office" is referable to the lands at all is a mere conclusion of law; and (3) the indictment fails to state a case in which any oath was required or permitted to be administered.

The allegations of the indictment in the particulars assailed, common to all the counts, after laying the venue, are that the defendant in said district within the jurisdiction of the court:

"Then and there unlawfully did willfully and corruptly suborn, instigate and procure one Charles S. Ely to appear in person before the register and receiver of the United States land office at Minot, in the district aforesaid, and then and there, before T. E. Fox, then and there the receiver of the said land office, to make and subscribe, before him, the said T. E. Fox, receiver as aforesaid, a certain oath and affidavit in writing then and there required by the laws of the said United States, in support of a certain application in writing of him, the said Charles S. Ely, then and there made to the register of the said land office; that is to say, a certain application in writing to enter, under the homestead laws of the United States, subject to entry at the said land office (here is set out a description of the land), and by such oath and affidavit, so made in support of said application to enter the said lands, falsely to depose and swear, among other things in substance, and to the effect," etc.

This is followed by a statement of the contents of the affidavit made by the applicant, with allegations as to the falsity of the matters sworn to, the corrupt procurement thereof by the defendant, with averment of the authority of said Fox to administer said oath.

The application in writing, the allegation clearly enough discloses, was to make entry of homestead lands, specifically described, under the homestead laws of the United States subject to entry at the United States land office at Minot, N. D. The clear intendment is that the lands were public lands, and as such were at the time subject to entry at said United States land office. The allegations in this respect were quite as full and specific as those contained in the indictment in *Stearns v. United States*, 152 Fed. 900, 82 C. C. A. 48, held by this court to be sufficient after verdict. It was there said, in substance, that it is common knowledge that public lands, like post office sites, military reservations, and the like, are not within the ordinary meaning of public lands of the United States and are not subject to entry or sale for any purpose, and therefore they are never understood to be in contemplation when speaking of entries of lands for homestead purposes; that in respect of lands bearing mineral, though nonapplicable to homestead entry, persons may nevertheless compass a fraud upon the government by obtaining possession of them under fraudulent affidavits.

The essential requirement of the law is that the charging part of the indictment shall sufficiently advise the accused, in advance of the trial, of the nature and character of the offense he may be required to come prepared to meet. When it does this, although it may be inartificially drawn or defective in matters of form, yet, if the defendant go to trial without interposing a motion to quash or demurrer, the statute (section 1025, Rev. St. U. S. [U. S. Comp. St. 1901, p. 720]) interposes, which declares that:

"No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

So Mr. Justice Brewer, in *Dunbar v. United States*, 156 U. S. 185, 192, 15 Sup. Ct. 325, 328, 39 L. Ed. 390, said:

"While it may be true that a defendant by waiting until that time (after verdict) does not waive the objection that some substantial element of the crime is omitted, yet he does waive all objections which run to the mere form in which the various elements of the crime are stated, or the fact that the indictment is inartificially drawn. If, for instance, the description of the property does not so clearly identify it as to enable him to prepare his defense, he should raise the question by some preliminary motion, or perhaps by a demand for a bill of particulars; otherwise it may properly be assumed as against him that he is fully informed of the precise property in respect to which he is charged to have violated the law."

The defendant did not, either by motion to quash or demurrer, invite the court's attention to any defect in the indictment; but on the trial objected to the introduction of any evidence by the government because of the claimed defects. This practice is not recognized in criminal procedure. *United States v. Harmon* (D. C.) 45 Fed. 414.

The rigors of the ancient common law in exacting much particularization in the description of the offense of perjury and subornation of perjury have been greatly modified by sections 5396 and 5397, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3655].

The allegation of the indictment as to the authority of the officer to administer the oath that "he, the said T. E. Fox, then and there being such receiver as aforesaid, and having due and competent authority to administer such oath to the said Charles S. Ely," was clearly sufficient within the provisions of the foregoing sections of the statute.

Error is assigned to the action of the trial court in admitting in evidence the affidavits of the proposed homesteaders, for the procuring of which the charge of subornation of perjury is predicated. The contention of defendant's counsel is that they were not both subscribed and sworn to before the register or receiver of the land office. They were sworn to before the proper officer, but the contention of defendant is that they were not also subscribed before him. The argument in support of this contention is that section 2290, Rev. St. U. S. only required that:

"The person applying for the benefit of the preceding section (that is the section authorizing the entry) shall, upon application to the register of the land office in which he is about to make such entry, make affidavit before the register or receiver," etc.

As this statute did not require that the affidavit should be subscribed before the register or receiver, in consequence thereof it occurred in instances that the application for entry would be signed by a party entitled to file as a homesteader upon certain representations made to him, but would be sworn to by another party presenting himself before the register or receiver. So that in prosecutions for making false affidavits identity between the party signing and the party swearing to it could not be shown.

It is claimed that to obviate this practice and abuse, on March 3, 1891 (Act March 3, 1891, c. 561, 26 Stat. 1097 [U. S. Comp. St. 1901, p. 1389]), Congress amended said section as follows:

"That any person applying to enter land under the preceding section shall first make *and subscribe* (italics the court's) before the proper officer and file in the proper land office an affidavit," etc.

The contention is that before the party was entitled to make the entry he should both make and subscribe to the affidavit before the proper officer; that the making of the subscription before the proper officer is just as essential as that he should make the oath before him; that, as the authority of the register or receiver to administer oaths is limited to matters connected with entries of public lands, they are not authorized to administer oaths for any other purpose or in any other manner; and that the certificate to the affidavit must both state that it was subscribed and sworn to before him.

The statute, however, declares:

"That if the said applicant making such affidavit or oath, swears falsely as to any material matter contained in said proofs, affidavits, or oaths, the said false swearing being willful and corrupt, he shall be deemed guilty of perjury," etc.

While it may be conceded that the purpose of Congress in so amending the statute as to require that the affidavit should be subscribed and sworn to before the officer might be for the purpose of such identification, it is rather evidential in character. The substantive offense denounced by section 5392 of the statute is that:

"Every person who, having taken an oath before a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, etc., or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury."

In other words, the corrupting act consists in taking the false oath before a competent tribunal or officer in a case in which a law of the United States authorizes an oath to be administered.

Aside from this, however, the testimony of some of the witnesses, especially that of Mr. Hall, whose affidavits were the predicate of one or more counts on which the defendant was convicted, showed that the witness both subscribed and swore to it before the register of the land office. That is sufficient in this respect to support the verdict on those particular counts.

Error is also assigned of the action of the trial court respecting the use made in evidence of the tract book kept in the land office, and the statements and explanations made by the witness Sanborn, the register of the Minot land office, touching memoranda in this book. In the trial of the case it became necessary for the government to show that the particular land in question was vacant public land, and subject to homestead entry, at the time of the presentation of the preliminary affidavit under investigation. To this end, said Sanborn, the custodian of the tract book in the office, was introduced as a witness, who made explanation respecting certain abbreviated entries therein. Objection was interposed by defendant's counsel against the admission of the book itself, on the ground that it was an unauthorized book, that the entries therein were unintelligible; and objected especially to a notation on some of the tracts to the effect that the entry thereof was under investigation. As the latter matter was withdrawn by the government it need not be considered.

Section 2295, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1398], declares that:

"The register of the land office shall note all applications under the provisions of this chapter, on the tract books and plats of his office, and keep a register of all such entries, and make return thereof to the general land office, together with the proof upon which they have been founded."

The tract book in question was an official register authorized by the statute, and was competent evidence for the purpose for which it was introduced. The notations were in abbreviated form, and the register explained their import. For example, certain portions of a section which had been entered or the entry canceled were indicated by the words and figures "SE⁴" and "SW⁴," and the like, which he stated meant the southeast quarter or the southwest quarter of the section. The objection to this was that the book, if regarded as a record, must speak for itself. While some courts have held that under special statutes in respect of the assessment and sale of lands for taxes such abbreviations are insufficient, we are of opinion that the common use of such abbreviations on books like those kept in the land offices warranted the court in saying that the knowledge of their import is so universal among the people as not to have required any explanatory testimony, aliunde the record. Some of these abbreviated notations on the face of the books consisted of the letters "F. C.," which the register testified indicated that the final certificates had been issued on the entry; the abbreviation "H. E." meant homestead entry; "S. D. S." meant Soldier's Declaratory Statement; the word "Can." meant canceled entry; "rel." meant relinquished entry.

The statute only requires that the register shall "note" on the tract book applications, and keep a register of such entries. The form and size of such tract book, as every person knows who has had occasion to visit the land office, make it quite impossible that the limited space allotted to each subdivision of land should admit of the notations indicating the history of the acts done respecting the given quarter section being written out in full. Immemorial usage in this respect, so well known to the public, warrants the method. The notations made by the officer are not muniments of title, but merely an indication to him as to the status of the land on his tract book. If, therefore, the necessary abbreviation expressed to the clear understanding of the keeper of the book what that status is, no sensible reason occurs why the register may not by parol explain what the abbreviated notations stood for. In other words, the only purpose of this testimony being to show whether or not the given tract of land was subject to entry when the application to file was made, it is competent for the custodian of the book, familiar therewith, to state that the notations showed the land was open to entry. Furthermore, after the defendant had investigated, as the evidence tends to show, the condition of the land and procured the affiants to make application therefor, as subject to homestead entry, and the entry was so made, it hardly lies in his mouth on trial for procuring false affidavits to gainsay the purport of the words noted on the tract book which were there at the time of the entry. He could not possibly have been prejudiced by the evidence, because he

understood when the entry was made that the lands were subject to entry as and for a homestead.

We are now brought in this discussion to consider questions respecting the action of the court in excluding and admitting certain testimony. It is to be kept in mind throughout this investigation that there was involved under each count of the indictment two pivotal issues. There must have been perjury committed by the designated affiant and the procuring of the affidavit by the defendant. An indispensable element of the first postulate is that the imputed false statement by the affiant must have been willfully and corruptly made; and in the second instance the defendant must have procured the making thereof with knowledge of the fact that the affiant was swearing falsely.

The contention of the defendant, *inter alia*, is that up to and including the time of the making of the filing affidavits the defendant understood, and so the affiants were given by him to understand, that the construction placed by the land office department on the homestead laws in respect of soldiers and widows of soldiers, such as the entrymen in question, was that they were not required to make actual settlement upon and cultivate in person the land to entitle them to make final proof and obtain a patent; that it was permissible for the defendant to furnish them the money to make such entry and the improvements thereon; and that they might thereafter, at their option, deed him the land at a given price plus the money so advanced by him. Quite different is the crime of perjury as applied to such situation from the instance of a conspiracy to fraudulently obtain the use and title to public lands under simulated homestead entries. In the case at bar the crucial question is the willful, corrupt swearing of the applicant, and the procurement thereto by the defendant with guilty knowledge of the false statement.

To support his contention, in part, the defendant offered in evidence what is known as Exhibit A in the record, designated "Instructions. Department of the Interior. General Land Office. Washington D. C., July 7, 1904. Registers and Receivers, U. S. Land Offices"—which is as follows:

"Sirs: The Department held December 7, 1903, in the Anna Bowes case (32 Land Dec. Dep. Int. 331) as follows:

"The widow or minor children of a deceased soldier or sailor, making homestead entry under section 2307 of the Revised Statutes [U. S. Comp. St. 1901, p. 1417], must comply with the requirements of the homestead laws as to residence and cultivation to the same extent as a soldier or sailor making entry under section 2304.

"The right to make entry under section 2307 is not transferable, and any contract entered into either before or after entry, which contemplates the sale thereof, is in violation of law.

"Directions given that all persons having uncompleted homestead entries made under section 2307 be immediately notified, by registered letter to the last known address of the party making the entry, as shown by the records of the land office, that if they desire to retain such entries they will be required to begin actual residence upon the land within six months from the issuance of such notice, or, if they so elect, they will be permitted to relinquish their entries, without prejudice to their homestead rights, by giving notice of such election within the same time."

"(1) You are therefore directed to at once notify, by registered letter addressed to the last known address of the entryman as shown by your office

records, each person having an uncompleted homestead entry made under section 2307 of the Revised Statutes:

"(a) That he is required under his existing entry to comply with the requirements of the homestead law as to residence and cultivation to the same extent as is required of a soldier or sailor making entry under section 2304 of the Revised Statutes; that is, for such period as, when added to the military or naval service relied upon, shall equal the required period of five years, with this exception, that where a soldier, whose service is depended upon, died during his term of enlistment, the whole term of his enlistment will be credited upon the period of residence and cultivation required under the homestead laws.

"(b) That the right to make homestead entry under section 2307 of the Revised Statutes is not transferable, and that any contract entered into, prior to the completion of final entry, which contemplates the sale of the land, is in violation of law.

"(c) That under departmental ruling he is allowed six months from date of your letter of notification within which to begin actual residence upon the land heretofore entered, and that should he fail to begin such residence prior to the expiration of such period of six months and thereafter maintain same, his entry will be subject to contest and cancellation for abandonment.

"(d) That should he so elect he will be permitted to relinquish his existing entry without prejudice to his right to make another, provided he shall file in your office, within the above-mentioned period of six months, a relinquishment of all right, title, and interest under his existing entry.

"(2) Upon the filing in your office of such a relinquishment you will immediately cancel the entry and hold the land formerly covered by such entry subject to disposal as in other cases made and provided for.

"(3) Until the expiration of the period of six months no existing entry under section 2307 of the Revised Statutes will be subject to contest upon the ground of abandonment.

"(4) At the expiration of said period of six months you will report each case separately to this office with proof of service of notice as above required upon the entryman, for filing with the papers relating to such case and for such further action as the facts of the case may warrant."

To the admission of this circular the district attorney objected for incompetency, irrelevancy, and immateriality. In that connection he offered:

"To admit upon the record that formerly the opinion prevailed in the local office at Minot, as testified to by some of the witnesses, that residence was unnecessary on the part of widows of soldiers entering lands under the homestead law, and that on July 7th instructions were received from the General Land Office correcting that impression and reversing it, and instructing the local land office to notify all such entrymen to establish a residence within six months, and that such notices were sent out by the local land office to each of the entries of that character involved in this case. Beyond that, we object to the introduction of this exhibit for the reasons stated, and that its contents are hearsay and not admissible under any of the issues involved here."

The court said:

"I think there is matter in this exhibit which would be highly prejudicial if it was received, and, in view of the admission which the government has made, the objection is sustained."

We are inclined to the opinion that this letter of instructions from the land office department was of the nature of a regulatory rule of the Interior Department, under the immediate control of the Commissioner of the General Land Office. Mr. Justice Brewer, in *Caha v. United States*, 152 U. S. 221, 222, 14 Sup. Ct. 513, 517, 38 L. Ed.

415, speaking of rules and regulations prescribed by the Interior Department not having been formally offered in evidence, said:

"We are of opinion that there was no necessity for a formal introduction in evidence of such rules and regulations. They are matters of which courts of the United States take judicial notice. Questions of a kindred nature have been frequently presented, and it may be laid down as a general rule, deducible from the cases, that wherever, by the express language of an act of Congress, power is intrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice"—citing a number of authorities.

Section 453, Rev. St. U. S. [U. S. Comp. St. 1901, p. 257], provides that:

"The commissioner of the general land office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government."

Section 2478, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1586], declares that:

"The commissioner of the general land office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specially provided for."

The document in question was a pronouncement by the General Land Office Department establishing a permanent regulation respecting entries of the public lands pertinent to the entries in question. It is observable that in the statement of Mr. Justice Brewer, *supra*, he did not say that such a regulation from the department could not formally be introduced in evidence, but that even without such formal presentation the court should take judicial notice thereof. How was the defendant to obtain the benefit of this regulation if it were not placed before the jury? The only way he could get a ruling on its legal effect and competency was to present it to the court as a matter of evidence to go to the jury. The court did not exclude it on the ground that it need not be formally offered in evidence as the court would take judicial cognizance thereof and in its admission or its direction to the jury define and limit its effect; but it was excluded because the district attorney consented that it might go upon record, as an admission that formerly the opinion prevailed in the local office at Minot, etc., thus undertaking to limit the language and purport of the regulation by his own interpretation. The court having thus barred it from the consideration of the jury for any purpose, after it was pressed for consideration, it was neither respectful nor necessary for defendant's counsel to urge it in other manner to secure the benefit of the exception taken to the court's ruling. *Long-Bell Lumber Company v. Stump*, 86 Fed. 583, 30 C. C. A. 260; *Glover v. United States*, 147 Fed. 431, 77 C. C. A. 450. The defendant was entitled to have the

jury consider the whole regulation and determine whether or not it was an implied admission by the department of government intrusted with the matter of regulating such entries of the public lands that hitherto, up to the ruling in the Anna Bowes Case, actual settlement and cultivation upon such lands by soldiers and soldiers' widows were not required. It tended to confirm the testimony of the defendant of his understanding of the practice in that respect, and bore directly upon the essential issue of criminal intent.

In all fairness to the defendant, as a corroborating fact of his claimed understanding of the practice aforesaid, this should have been admitted on the sharp conflict between his testimony and that of the witness J. R. Hall. The government was indulged to go back more than three years prior to the finding of the indictment to inquire of said Hall respecting a verbal arrangement between him and the defendant for entering the land in the Minot district, who detailed a conversation claimed to have been had with the defendant about his entry; that he was conscious of committing perjury when he swore to his application; and that he did it in carrying out his understanding with the defendant, to the effect that in consideration of the sum of \$200 he was to convey this land to the defendant on making final proof, which the defendant denied; and, further, that he (Hall) did not make actual settlement and improvement thereon. It would be a corroborative circumstance for the defendant to show that it was the common understanding, acquiesced in by the land office department up to that time, that no such actual settlement and cultivation by the entrymen were required; and most certainly it bore upon the question as to whether or not the defendant in that respect was guilty of subornation of perjury in Hall's case.

There are many assignments of error respecting the action of the court in allowing certain questions asked by the prosecution and the disallowance of questions on the part of the defendant. We will only consider such of these errors as are deemed representative.

Mrs. Arnold was one of the persons charged to have made a false affidavit by the procurement of the defendant. She was introduced as a witness by the government, and was by no means an unwilling witness. To show the defendant's conscious sense of irregularity in his action in this matter, this witness testified respecting a conversation had with the defendant after she was advised that the later ruling of the land office department required that she make an actual settlement and cultivation of her homestead, and after she moved on to it. She testified that, after she received a letter from the land office saying it was unlawful for her to take up land under a contract, she saw the defendant in January and February, 1905, when she had a conversation with reference to the land; "and he told me that the law was changed, that I would have to go and prove up the land. I asked him if it was worth proving up, and he said 'Yes,' it was a better piece of land than he thought it was when he took it up, and also said that when it was proved up it would be worth a thousand dollars. When I came back I often saw and spoke to Mr. Nurnberger; that is when I came back to live on the land. I had no conversation in particular that I remember of with Mr. Nurnberger on the subject of this contract that

I made with him." Whereat, the district attorney asked the following question:

"Well, give us the general conversation you had with him then."

To which the defendant interposed objection that it was incompetent because relating to a matter occurring subsequent to the matters alleged in the indictment counting on this entry, and the intent of the defendant not being an essential element, etc. The objection was overruled. The witness answered:

"Why, he spoke about some one getting him in trouble. * * * I have had no conversation with Nurnberger since I came to Fargo, but have talked with him on different things, but not on this since I came to Fargo here as a witness. He told me to tell the truth."

Her answer was not satisfactory to the prosecution, and thereupon the district attorney asked the following question:

"I want to refresh your recollection. Do you remember Mr. Nurnberger saying to you since you came to Fargo that if it were not for his sons that he would let the trial go, and that he told you, 'I said to my sons to get out of the blamed state and let it go?'"

This was objected to as leading and cross-examination of the government's witness. The objection was overruled. The witness answered:

"Why, he said something but I don't remember: I can't remember just what he said."

"Q. State whether or not that was the substance of it."

Objection was again interposed on the ground that it called for a conclusion of the witness. This objection was overruled. The witness answered:

"Yes. I can't repeat the words he said. It was something like that, but I can't remember the words he said. I think it was to that effect."

It must be confessed that this was most obnoxious to the objection of a leading examination of the prosecution's own witness. It not only suggested the matter desired, but put words in the mouth of the witness who could then only say "it was something like that." The government, however, got the full force of the words suggested by the prosecutor.

The same offense was repeated in other instances; strikingly so in the case of Hall, the affiant named in the tenth count of the indictment, on which a conviction was had. He had no written contract with the defendant respecting the land, and testified about conversations he had with the defendant in 1902 respecting the entry. He admitted that he was conscious in making the affidavit that he was swearing to what was not right, that he did not intend to comply with the homestead law in making settlement, cultivation, etc., and that he did not file in good faith. Thereat the district attorney asked the following question:

"Wasn't it the facts under which you came out there and the purposes for which you came out there?"

This was objected to on the ground that it was leading and suggestive. The objection being overruled, the witness answered:

"Yes, sir. I knew at that time about my arrangement with Mr. Nurnberger. There was no other fact or circumstance with reference to my coming out to North Dakota to take up lands which affected my rights in any way to my knowledge except my arrangements with Mr. Nurnberger."

"Q. Any impression that you had that the transaction was wrong, was it based on anything else than your arrangement with Mr. Nurnberger? That is, was that all or was there more?"

This was objected to on the ground that it was leading, suggestive, and argumentative. The objection was overruled, and the witness answered:

"Well, I couldn't take the oath without doing wrong; that is the way I took it. I couldn't fulfill my contract without doing something that I thought was not right."

In the examination of Mrs. Lowell, one of the affiants counted on in the indictment, the prosecution being concerned to show that she made the affidavit reciting that she applied to enter the land for a homestead, not to inure to the benefit of another, and that she was induced thereto by the defendant, the following questions were asked:

"Q. State whether or not the manner in which the business was done and the extent to which it was done by Mr. Nurnberger had anything to do with making you believe that it was proper and lawful?"

Objection thereto being overruled, she answered:

"He didn't say anything about it, whether it was or not."

This being unsatisfactory to the prosecution, it was followed up with the further question:

"What I want to get at is this: State whether or not you was led to believe and did believe that the transaction was proper because it was done openly by so many people there at that time, whether that had anything to do with it."

Objection to this was overruled, and she answered:

"Yes, sir; when the affidavit was read over to me by the lawyer, I heard him say 'that my said application is honestly and in good faith made for the purpose of actual settlement and cultivation and not for the benefit of any other person, persons, or corporation,' but I didn't understand that way. I also heard the lawyer read, 'and that I will faithfully and honestly endeavor to comply with all the requirements of the law as to settlement, residence and cultivation necessary to acquire title to the land applied for,' and 'that I am not acting as agent for any person, corporation or syndicate to give them the benefit of the land entered or any part thereof or of the timber thereon,' and 'that I do not apply to enter the same for the purpose of speculation but in good faith,' etc. But I don't remember him reading 'and that I have not directly or indirectly made and will not make any agreement or contract in any way or manner, with any person, or persons, corporation, etc., by which the title I might acquire from the government should inure in whole or in part to the benefit of any person except myself.'"

Finney is another entryman counted on in the indictment. He had a written agreement with the defendant respecting the arrangement between them. He was a witness for the government. The district at-

torney, over the objection of the defendant, was permitted to interrogate him as follows:

"What was the agreement between you and Nurnberger, just state it all?"

This was objected to, *inter alia*, that as the agreement was in writing it spoke for itself, and if verbal the proper way to show what it was was to state the terms thereof. Then the district attorney asked:

"State whether or not you made the trip to North Dakota and filed on the land to carry out your agreement with Nurnberger."

He answered:

"Well, that was about the size of it."

When the defendant was on the witness stand he was asked by his counsel:

"You may state if at any time you made a contract with anybody to locate them on lands under the terms of which you were to have the land at all events when he proved up."

The court sustained objection to this. He was further asked by his counsel:

"State what the terms and conditions of your agreement were when you located her (meaning Mrs. Arnold)."

Remarkably enough, in view of rulings by the court on like objections interposed by the defendant's counsel, the objection to the above question was sustained on the ground that it "called for a conclusion and not a conversation and documents."

The general rule undoubtedly is to leave the propriety of leading questions to the sound discretion of the trial court, the exercise of which is not ordinarily ground of error. The application of the rule obtains where the witness is apparently unwilling, or unfriendly to the questioner, or where the party has been misled by previous assurances to counsel. It must, however, be conceded that the abuse of such discretion would have no corrective if it were rigidly maintained that it is not reviewable. The repeated indulgence to the prosecutor in putting leading questions, and in form to suggest the answer, and calling for the mere conclusion of the witness, was manifestly unfair and prejudicial to the defendant. Many of these witnesses were not unfriendly to the prosecution, or displayed any reluctance to aid it. After the ruling of the land office department, indicated by said Exhibit A, there was some flurry among these entrymen, from apprehension of exposure to a prosecution for perjury. They were visited by an inspector. Some of them voluntarily placed in his hands the agreements between them and the defendant under which he undertook to find the lands. The witnesses, Arnold and Hall, most certainly needed no suggested testimony, or to have put in their mouths words to express it.

It were but affectation to pretend that these witnesses did not testify under the conscious sense that probably they would more certainly secure immunity for themselves by contributing freely to the conviction of the defendant. And in view of the stress under which the affiants testified it was hardly charitable to press them for an answer to

words framed by the prosecution when a failure to respond to his liking might, in their minds, endanger their desired immunity.

Words are at times especially significant. If counsel are permitted to so frame a question put to their own witness as to suggest the answer desired, there is always imminent danger of getting before the jury the phrases and ideas not really those of the witness.

Why should not the defendant have been permitted to testify that he made no contract with any of the affiants in question whereby he was to have the land in any event? It was permissible for him to testify that he did not so understand the arrangement he made with them. It is settled law that a party charged with the commission of a crime or the perpetration of a fraud may testify that he entertained no criminal or fraudulent intent. The very gist of the crime of perjury is made by the statute itself to depend upon the fact that the oath made should not only be false, but the falsehood must have been willfully and corruptly asserted. So if the affidavit made or procured was in ignorance of its contents, or under a misapprehension of its purpose, no matter how culpably negligent in a civil action the party might be, he could not be convicted of perjury, because the act was wanting in the required willfulness and corruption. The witness should have been permitted to answer the question as to whether or not he had ever made any claim to the land entered by Mrs. Arnold, especially in view of the fact that the district attorney, over the objection of his counsel, was permitted to show by the cross-examination of the defendant that in respect of some lands entered by some soldiers as homesteads as far back as 1900-1901, not counted on in the indictment, the defendant had obtained deeds thereto from such soldier soon after the entry, and prior to final proof. If that were permissible against the defendant to show "guilty knowledge," as ruled by the court, why was it not permissible for the defendant to state that as to the land of Mrs. Arnold, who had testified energetically against him, he had made no such claim? It is difficult to escape the impression that the court was either too indulgent to the government or too discriminating against the defendant.

Justice takes delight in according to every human being, charged with the commission of a crime, a fair and impartial trial. Prescribed rules of criminal procedure are the outgrowth of long and sane experience, buttressed by the earnest study and wisdom of jurists and lawgivers. They may be hedged about by some refinements, unjustly stigmatized by overzealous partizans as "mere technicalities," yet judicial, impartial, history attests the fact that often they constitute effective barriers against unreasoning passion and the behests of spasmodic clamor.

Complaint is made of that portion of the charge to the jury in which the court said:

"These affidavits are before you. They will go to the jury room with you. It is conceded in each case that the entrymen swore to the affidavit. That is one fact we start out with. What is the second fact? Did these affidavits contain any statement which was not true?"

The court then said, if the statements were true, that was the end of the case; if they were not true, the jury would proceed to the in-

quiry as to whether the entrymen signed the affidavits knowing that they contained those statements, or any of them, and that any such statement was not true; if they did and intentionally swore to the affidavit, they committed perjury.

The generalization of this direction was calculated to mislead the jury. It apparently, to the mind of the laymen, narrowly directed attention to the effect of the mere recitals of the affidavit. It authorized the jury to find that, if the affiant did not intend to make actual settlement on and cultivation of the land, the oath was criminal; although the affiant may have understood and believed that as applied to his or her condition and privilege, the affiant was not required to make settlement on and cultivate the land; and therefore gave no heed to such recital in the affidavit, regarding it as formal and not material. The oath, under such conditions, would not be willful and corrupt, as it would be wanting in essential criminal intent. The charge should have been so qualified in the immediate connection to avoid the danger of the jury being misled by the stress laid upon the abstract recitals.

Other errors are pressed for consideration, but they are not of sufficient importance to justify the further extension of this prolonged discussion; and the matters complained of may rectify themselves on a second trial.

The judgment of the District Court is reversed, and the case remanded, with directions to grant a new trial.

HOOK, Circuit Judge (dissenting). That the defendant was guilty was shown overwhelmingly and beyond every reasonable doubt. Indeed, the proof went to the verge of confession. The matters mentioned in the opinion, even if unexplained in the voluminous record of a long trial, which I think is not the case, contributed nothing to an unjust result. The contention of counsel that the District Attorney was occasionally allowed to ask leading questions is, it seems to me, a fair illustration of the merit of the grounds relied on for reversal.

(156 Fed. 736.)

GRAY v. GRAND TRUNK WESTERN RY. CO.

(Circuit Court of Appeals, Seventh Circuit. May 18, 1907. Rehearing Denied Oct. 22, 1907.)

No. 1,339.

1. LIMITATION OF ACTIONS—PLEADING—DEMURRER RAISING DEFENSE.

Under the common-law practice in force in Illinois, the question of limitation cannot be raised on demurrer to a declaration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 83, Limitation of Actions, §§ 670-675.

Conformity of practice in common-law actions to that of state court, see notes to *O'Connell v. Reed*, 5 C. C. A. 594; *Nederland Life Ins. Co. v. Hall*, 27 C. C. A. 392.]

2. RECEIVERS—INJURIES RESULTING FROM OPERATION OF PROPERTY—NATURE OF LIABILITY.

It is the settled doctrine of the federal courts that a receiver is not personally liable for injuries arising through negligent operation of the property not due to his personal negligence, but an action against him

for such injuries is in law one against the receivership in which the judgment recovered can be enforced only against the property or funds in his hands, and which cannot be maintained after the receivership has been closed and the receiver discharged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Receivers, § 322.

Actions by and against receivers of federal courts, see note to *J. I. Case Plow Works v. Finks*, 25 C. C. A. 49.]

8. SAME—ASSUMPTION OF LIABILITY BY PURCHASER OF PROPERTY—NATURE OF LIABILITY.

Where by the local law the obligation assumed by a successor or purchaser who takes over property or a fund from a receivership, with assumption of liabilities, is one of direct liability, and not merely equitable, for the payment of claims chargeable against the property or fund, such local law fixes the nature of the cause of action for the enforcement of such liability in a federal court, and an action at law may be maintained in such court against the purchaser alone to recover for a personal injury for which the property in the hands of the receiver was chargeable.

4. PLEADING—DECLARATION—DUPLICITY.

A declaration, in an action to recover for a tort committed by railroad receivers, against a purchaser which succeeded to the property, is not bad for duplicity because it alleges as grounds of liability an express assumption of liability for all claims against the receivership, and also that the defendant succeeded to betterments and improvements made by the receivers from earnings of the receivership which were liable for plaintiff's claim.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 134-137.]

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

This writ of error is from a final judgment against the plaintiff in error, as plaintiff below, upon demurrer sustained to the declaration, as finally amended, and election to stand by such declaration.

The transcript of record shows that the plaintiff in error filed suit in trespass on the case, December 7, 1900, in the superior court of Cook county, against F. C. Austin Manufacturing Company, and E. W. Meddaugh and Henry B. Joy, as receivers of Chicago & Grand Trunk Railway Company; and that in 1903 the Grand Trunk Western Railway Company was impleaded as a defendant therein. Subsequently, after issues joined and trial in that court upon which verdict was set aside, the proceedings resulted in submission to a dismissal as to the defendants Austin Manufacturing Company and the receivers (upon suggestion of the death of one receiver and discharge of the other, and delivery of all the railroad property to the defendant Grand Trunk Western Railway Company), and continuance of the cause with a new trial granted as against the Grand Trunk Western Railway Company. Thereupon, on application of such remaining defendant, the cause was removed to the Circuit Court of the United States, on June 19, 1905. Other proceedings in the Superior Court, which are referred to in the transcript, are not material upon this writ of error. Several amended declarations were filed, resulting in the final amended declaration, upon which this judgment of dismissal rests under demurrer.

This declaration avers that the plaintiff in error was injured on March 5, 1900, in operations of the railroad under receivers named, through negligence in such operation, while he was "in the exercise of due care and caution about his own safety," and that the receivers were appointed and acting under orders of the United States Court for the Eastern District of Michigan, in foreclosure proceedings against the railroad company then owning the road. For recovery thereupon against the defendant in error, subsequent proceedings in that court under a foreclosure decree are averred in the filing of a petition by the defendant in error, as purchaser under the decree, and an order of the court granting the prayer of the petition; each entitled in that cause and reading as follows:

First. "This petition of the Grand Trunk Western Railway Company respectfully shows:

"(1) That it is a corporation existing under and by virtue of the laws of the states of Michigan and Indiana, created as hereinafter stated; that it is now the owner of the entire railroad and property formerly owned by the Chicago & Grand Trunk Railway Company—one of the defendants in the above-entitled cause—which were embraced in and sold under and pursuant to the decree in said cause; and that it derived its said title through the following deeds of conveyance: (a) By separate deeds for each of the states of Michigan, Indiana, and Illinois, of the portion of said railroad and property lying and being in each of said states, by Walter S. Harsha, special master commissioner, to Charles M. Hays and Elijah W. Meddaugh, the purchasers at the sale, made pursuant to said decree, in which deeds said complainant, the Mercantile Trust Company (of New York), trustee, and said defendants, the Chicago & Grand Trunk Railway Company, the Union Trust Company (of Detroit), trustee, and Hugh Paton, trustee, joined. (b) By separate deeds of conveyance, for each of said states, by said Hays and Meddaugh, of that portion of said railroad and property lying and being in the state of Michigan to the Port Huron & Indiana Railway Company; of that portion thereof lying and being in the state of Indiana, to the Indiana & Illinois Railway Company; and of that portion thereof lying and being in the state of Illinois, to the Chicago Lake County Railway Company—each of said railway companies having been organized by said Hays and Meddaugh, pursuant to statutory provisions, for the express purpose of accepting such conveyances.

"(2) That subsequently said Port Huron & Indiana Railway Company and said Indiana & Illinois Railway Company were consolidated, and thereby your petitioner was duly created, pursuant to the statutes of the states of Michigan and Indiana. Afterward your petitioner, having become the owner of the entire capital stock of said Chicago Lake County Railway Company, purchased that part of said railroad and property lying and being in the state of Illinois, and received a deed thereof from said Chicago Lake County Railway Company.

"(3) That by the laws of the states of Michigan and Indiana, under and pursuant to which it was created as aforesaid, your petitioner is expressly made liable for all the debts and obligations of its constituent members, to wit: Said Port Huron & Indiana Railway Company and said Indiana & Illinois Railway Company; and by the laws of the state of Illinois, under and pursuant to which it acquired that part of said railroad and property lying in said state of Illinois as aforesaid, your petitioner is expressly made liable for all the debts and obligations of said Chicago Lake County Railway Company.

"(4) That in each of the several deeds through which your petitioner derived its title to said railroad and property as aforesaid, it is provided, in substance, that the conveyance is expressly made subject to the obligations by said decree imposed upon the purchasers of said railroad and property at said sale thereof by said special master commissioner, and upon their successors and assigns.

"Copies of each of said several deeds of conveyance which constitute petitioner's chain of title to said railroad and property are hereto attached.

"(5) It is provided in said decree, under and by virtue of which said railroad and property were sold to said Hays and Meddaugh as aforesaid, as follows, viz.: 'It is further ordered, adjudged, and decreed that the purchaser or purchasers of said railroad franchises and other property at such sale shall, as part of the consideration and in addition to the price bid, pay and discharge any and all receivers' indebtedness and liabilities that shall not have been paid by the receivers, and any and all claims heretofore filed in this cause, or that may be hereafter filed within four calendar months from the date of entering this decree, but only when and as the court shall allow such claims and adjudge the same to be a lien prior to the mortgage foreclosed in this suit; and shall pay all costs of court, fees of clerks and masters, and any sums awarded by the court to the parties to this suit, and their counsel, or to the receivers in this cause; and, furthermore, shall pay all costs and expenses involved in and incident to the suits instituted in said Circuit Courts of the United States for the District of Indiana and for the Northern District of

Illinois in foreclosure of said mortgage of April 10, 1880, and shall abide by and comply with and perform all other orders and decrees that may be made by this court or by said Circuit Courts of the United States for the District of Indiana and for the Northern District of Illinois, or either of them, in the said cases therein pending. Any such purchaser or purchasers, and his or their successors and assigns, shall have the right to enter his or their appearance in this court, or any other court, and he or they, or any of the parties to this suit, shall have the right to contest any claim, demand, and allowance existing at the time of the sale and then undetermined, and any claim or demand which may arise or be presented thereafter, which would be payable by such purchaser or purchasers, his or their successors or assigns, or which would be chargeable against the property purchased, in addition to the amount bid by such purchaser or purchasers at the sale, and may appeal from any decision relating to any such claim, demand or allowance.'

"(6) Your petitioner hereby admits itself to be the successor and assigns of said Hays and Meddaugh, within the intent and meaning of said decree, and that it is legally liable for all the obligations imposed by said decree upon the purchasers of said railroad and property at the sale thereunder as aforesaid, and is amenable to all orders and decrees of this court, of the Circuit Court of the United States for the District of Indiana, or the Circuit Court of the United States for the Northern District of Illinois, that may be made in respect thereof; and it hereby submits itself to the jurisdiction of this court and of said courts in respect of any such orders or decrees.

"(7) That your petitioner is desirous of securing immediate possession of said railroad and property, and, to that end, prays an order of the court directing the receivers to at once turn over and deliver the same to your petitioner, together with any money balances, credits, etc., growing out of or connected with the operation of said railroad and property by said receivers, that may be in their possession and control; your petitioner hereby signifying its willingness to accept and assume all outstanding obligations and liabilities of said receivers, and hereby undertaking to fully satisfy and discharge the same as they shall from time to time, within the terms of said decree in that behalf, be allowed and ordered paid by this court, by the Circuit Court of the United States for the District of Indiana, or by the Circuit Court of the United States for the Northern District of Illinois. And your petitioner is willing and hereby agrees to accept the full and final accounting of said receivers, as such accounts shall be rendered by them to petitioner, and consents to the final discharge of said receivers and the cancellation of their bonds as such receivers. Your petitioner prays that it may be permitted to enter its appearance, by its solicitor or attorney, in this cause and in the causes pending in the two other courts aforesaid, to the end that it may be heard respecting any claims that may now be pending or may hereafter be presented either against said Chicago & Grand Trunk Railway Company or against said receivers pursuant to the provisions of said decree."

Second. Whereupon the following order was entered:

"The foregoing petition being duly considered, and all parties to the suit, by their respective solicitors of record, consenting, it is hereby ordered: That the prayers of the petition be and hereby are granted. The receivers, E. W. Meddaugh and H. B. Joy, are hereby directed to turn over and deliver to said petitioner, on the 1st day of December, 1900, all of the railroad, property, money, accounts, and effects as prayed, and the said receivers are hereby relieved of any further accounting to this court for the administration of their receivership, and their bonds for the faithful performance of the duties of said receivership are hereby canceled, and the surety on said bonds hereby released."

It is then averred "that in pursuance of said last-mentioned order, entered as aforesaid, said railroad and railroad property and all the improvements and betterments made thereon by said receivers during said receivership, and all money balances, credits, etc., and all other property in the possession of said receivers, as aforesaid, were turned over and delivered to the said defendant, the Grand Trunk Western Railway Company." And that "by means of the premises and the petition, orders and decrees, as aforesaid, the said defendant, the Grand Trunk Western Railway Company, became and still is liable to pay to the plaintiff any and all damages sustained by him through

the negligence, as aforesaid, of said receivers"; that, though often requested, the defendant has not paid his said damages, but refused to pay the same to his damage of \$50,000. "and therefore he brings his suit."

The demurrer to this amended declaration is in the form of a general demurrer "for want of a sufficient declaration in this behalf," with seven specifications of cause, which are sufficiently referred to in the opinion.

John A. Brown, for plaintiff in error.

George W. Kretzinger, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The declaration avers an injury suffered by the plaintiff in error, while engaged in the service of the receivers, under circumstances which would charge the receivers with liability, upon due proof in a suit against them, prosecuted during the term of receivership. Suit was not commenced, however, until after sale of the res under a foreclosure decree, delivery to the defendant in error through a purchase thereunder, and discharge of the receivers, as averred in the amended declaration in question. The foreclosure proceedings referred to were in the Circuit Court of the United States for the Eastern District of Michigan, where the receivers were appointed, with ancillary proceedings and appointment in the Northern District of Illinois and elsewhere; and the plaintiff in error brought the present action, as trespass on the case, in the superior court of Cook county, Ill., against the receivers so appointed (and acting when the injury occurred), impleaded with T. C. Austin Manufacturing Company and Grand Trunk Railway Company, as defendants. More than two years elapsed before the defendant in error, Grand Trunk Western Railway, was impleaded as defendant; and subsequently there was a discontinuance as to the other defendants, with the defendant in error retained as sole defendant. Removal to the trial court ensued, and the declaration, as finally amended to charge liability thereupon, was challenged by demurrer. The inquiry whether it states a cause of action against the defendant in error is the only serious question for review, and its solution is not free from difficulty under the authorities.

Were the question of liability one arising in equity, in proper forum upon timely application, no difficulty would appear in framing the issues and granting the relief which equity affords upon proof of the facts, unless barred by limitation or laches. Instead of such course, with remedy sought at law, not only is the case governed by the rigid rules of that forum, but it has become complicated through mistakes in procedure and failure to bring in proper parties and charge liability within a period of limitation which may bar redress for the alleged cause of action in any forum. Upon demurrer, however, the question of limitation, for which the defendant in error contends, cannot arise under the common-law rules upheld in Illinois (*Gebhart v. Adams*, 23 Ill. 397, 76 Am. Dec. 702; *Gunton v. Hughes*, 181 Ill. 132, 134, 54 N. E. 895, 1 Chitty on Plead. [16th Am. Ed.] 506, 526), and that objection must be disregarded upon review of the ruling against the sufficiency of the declaration.

The matter for which recovery is sought is the injury alleged to be

caused by negligence on the part of the receivers in their operation of the railroad property in custodia legis. As the defendant in error had no part or interest in such operation, nor existing interest even in the property, it was plainly not answerable for the alleged negligence when this cause of action accrued; but liability is predicated upon the further averments of subsequent transactions in the purchase of the property, under decrees in the foreclosure proceedings, whereby it assumed obligations incurred by the receivers. In other words, with a cause of action set up against the receivers—neither acknowledged by them nor sued upon within the terms of receivership—recovery is sought against the purchaser alone, as for an obligation thus assumed through the terms of purchase and circumstances of succession in estate.

The general doctrine which controls the enforcement of remedies in the federal forum has frequently been declared by the Supreme Court, as preserving the distinctions between law and equity, under the constitutional grant of judicial powers, so that "the adoption of the state practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit," in conformity with such state practice. *Bennett v. Butterworth*, 11 How. 669, 674, 13 L. Ed. 859; 5 Notes U. S. Rep. 60; *Lindsay v. Shreveport Bank*, 156 U. S. 485, 493, 15 Sup. Ct. 472, 39 L. Ed. 505. With no averments to charge direct or personal common-law liability against the defendant in error, these considerations set up for recovery, through purchase and succession to the railroad property—at least aside from the express assumption of receivership obligations—are not legal obligations at the common law; and as equitable obligations alone they are barred from enforcement at law, under the above-stated doctrine. So, in reference to the alleged assumption of liability, without privity between these parties, the general rule upheld in *National Bank v. Grand Lodge*, 98 U. S. 123, 125, 25 L. Ed. 75, and *Keller v. Ashford*, 133 U. S. 610, 620, 10 Sup. Ct. 494, 33 L. Ed. 667, would stand in the way of such enforcement, unless the subsequent opinions in *Willard v. Wood*, 135 U. S. 309, 313, 10 Sup. Ct. 831, 34 L. Ed. 210, and *Union Life Insurance Co. v. Hanford*, 143 U. S. 187, 190, 12 Sup. Ct. 437, 36 L. Ed. 118, are applicable to modify the rule.

Under the first-mentioned doctrine, it has long been the rule of the federal jurisdiction—both before and since the general enactment of 1872 (Act 1872, c. 255, § 5, 17 Stat. 197; section 914, Rev. St. [1 U. S. Comp. St. 1901, p. 684]), adopting "the practice, pleadings, and forms and modes of proceeding" of the states respectively—in common-law civil cases, that equitable claims and defenses are not enforceable at law in the federal court, notwithstanding such authorization in the courts of the state. *Lindsay v. Shreveport Bank*, *supra*. Without plain sanction, either for departure from that rule or for the exercise of jurisdiction at law under conditions and in precedents applicable to these averments, the present suit would not appear to be maintainable, and demurrer to the declaration was rightly sustained. On the other hand, if the later decisions of the Supreme Court establish a rule—whether by way of modification of such doctrine or other-

wise—which authorizes the remedy thus sought, they are to be observed as controlling.

Expressions in the opinions in the above-mentioned cases of *Willard v. Wood* and *Union Life Insurance Co. v. Hanford* may not appear in harmony with the view that no claim purely equitable can be enforced at law under the sanction of the state practice. In each of these cases, speaking in reference to the enforcement by a mortgagee of a covenant between his mortgagor and a grantee of the latter for payment of the mortgage indebtedness, it is stated (without qualification) that:

“The question whether the remedy of the mortgagee against the grantee is at law and in his own right, or in equity and in the right of the mortgagor only, is * * * to be determined by the law of the place where the suit is brought.”

In neither case, however, can these remarks be accepted as decisive of the present inquiry, under our understanding of the issues there involved. The issue in *Willard v. Wood* was whether such obligation was enforceable in a suit at law by the mortgagee against the grantee, without privity between the parties; and the denial rests, as stated in the opinion, on the authority of *National Bank v. Grand Lodge*, *supra*, and *Keller v. Ashford*, *supra*, upholding the common-law rule. The remarks upon remedy, as “governed by the *lex fori*, the law of the District of Columbia, where the action was brought,” were made *arguendo*, in answer to the contention that the plaintiff was entitled to the benefit of the rule in New York (where the property and conveyance were located), which authorized such suit “either in equity or at law.” Whether there was any provision or rule in New York fixing the nature of the obligation was not there considered. That the rule of practice referred to could not fix the form of remedy in another forum was decided in conformity with the citations in the opinion, and the comment must be read in that view. In *Union Life Insurance Co. v. Hanford*, the suit was in equity for foreclosure of a mortgage, in the federal court, sitting in Illinois, and issue arose upon claim of a deficiency judgment against the mortgagor. The defense was that his personal liability was discharged by an extension of time granted by the mortgagee to a grantee of the mortgagor who had assumed payment of the debt; and, the fact being undisputed, the sole test of liability was whether the grantee became directly and primarily obligated in favor of the mortgagee, so that his relation to the mortgagor became that of principal with the latter as mere surety for the debt. Under the law of Illinois, the opinion states that such was the well-established nature of the liability; and, thus applying the law of the contract, the defense was sustained. By way of premise for this conclusion, the opinion refers to the “remedy of the mortgagee against the grantee” as determined by the law of the place where suit is brought (in the language above quoted), with the remark, “as was adjudged in *Willard v. Wood*.” But the decision, upon our understanding of its import, rests on the interpretation of the agreement in question as creating direct (legal) liability, in conformity with the local law, for which remedy at law was proper.

In the case at bar, however, the equitable features are far more complicated than those involved in either of the above-mentioned decisions. The special nature of the liability incurred for injuries arising through negligent operation, under a receivership, has been fruitful of much discussion in judicial opinions and text-books; but no review of the various theories is needful for the present inquiry, as these propositions are well settled in the federal courts: (a) The receiver is not chargeable with personal liability for such injuries, not due to his personal negligence or conduct, but is chargeable as the representative of the property and funds in his custody within the limits of such property and of his possession or control. (b) "Actions against the receiver are in law actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasan-ces, negligences, and liabilities are official, and not personal, and judgments against him as receiver are payable only from the funds in his hands." *McNulta v. Lochridge*, 141 U. S. 327, 332, 12 Sup. Ct. 11, 35 L. Ed. 796. (c) Prior to the act of Congress of 1887 (Act March 3, 1887, c. 373, 24 Stat. 554, 1 Comp. St. 1901, p. 582), the receiver could not be sued without leave of the court having custody of the res, and all claims were subject to adjudication in such court. *Davis v. Gray*, 16 Wall. 203, 218, 21 L. Ed. 447; 7 Notes U. S. Rep. 980. In other words, no liability arises which is enforceable at law, except as authorized either under the terms of this statute or by the court administering the property. (d) With the termination of the receivership and transfer of property and funds, as disclosed in the declaration, the suit at law was not maintainable against the receivers. *McNulta v. Lochridge*, *supra*, and 12 Notes U. S. Rep. 30; *Beach on Receivers* (Alderson) §§ 720, 725; *Gluch & Becker on Receivers*, § 82; 2 *Elliott on Railroads*, § 587; *Archambeau v. Platt*, 173 Mass. 249, 251, 53 N. E. 816.

The defendant in error, as purchaser of the property and successor to the fund, having no part in the alleged tort, if chargeable for the damages, is chargeable alone through liability assumed in the purchase and circumstances of succession; and then only, under the facts averred, in conformity with the principles of equity, if governed by the general doctrines above referred to. In such aspect, however, the case is, as we believe, directly within and ruled by the decision of the Supreme Court in *Texas & Pacific Railway v. Bloom*, 164 U. S. 636, 643, 17 Sup. Ct. 216, 41 L. Ed. 580, supplementing the prior decision in *Texas & Pacific Railway v. Johnson*, 151 U. S. 81, 99, 14 Sup. Ct. 250, 38 L. Ed. 81. While the earlier case of *Johnson* arose upon writ of error to the Supreme Court of Texas, and the personal judgment against the corporation succeeding the receivership was affirmed upon the ground that the question of liability was one "of general law and for the state court to pass upon," the *Bloom* Case arose in the Circuit Court of the United States, and was brought from the Circuit Court of Appeals on error to the Supreme Court. Both cases were identical in the circumstances upon which the liability of the corporation was predicated, and the opinion (151 U. S. 99, 14 Sup. Ct. 250, 38 L. Ed. 81) affirming the *Johnson* judgment thus summarizes the rule adopted by the state court for charging personal liability:

"In the view of that court, a railway company might be held directly liable when a receiver is appointed in an amicable suit at the instigation of the company and for the company's own purposes, and, these purposes being accomplished, the property is returned to its owner, the rights of no third persons as purchasers intervening, upon the ground that the acts of the receiver might well be regarded as the acts of its own servant, rather than those of an officer of the court, which under such circumstances he would only be *sub modo*. But as the court did not feel authorized to entertain a conclusion which might carry the implication that this receivership would have been created or continued, although its object had only been to place the property temporarily beyond the reach of creditors until it could be augmented in value by improvements made from earnings under the protection of the court, that rule was not applied in this case. The company was held liable upon the distinct ground that the earnings of the road were subject to the payment of claims for damages, and that as, in this instance, such earnings to an extent far greater than sufficient to pay the plaintiff had been diverted into betterments, of which the company had the benefit, it must respond directly for the claim. This was so by reason of the statute (Laws Tex. 1887, p. 120, c. 131, § 6), and, irrespective of statute, on equitable principles applicable under the facts."

On examination of the statutory provision referred to under the title of "Receivers," which mentions liabilities to be paid by a receiver out of moneys coming into his hands, we find no obligation imposed, either upon receiver or fund, not within the general rules of equity and well recognized as thus chargeable.

The subsequent case of Bloom, brought from the federal court, involved not only the question of liability, upheld in the prior decision when arising in a state court, but the further question of direct enforcement at law in the federal forum. Error was assigned upon the contention that the alleged cause of action was equitable and furnished no support there for a personal judgment at law; and thus presented, as in the present instance, the main question for review. In overruling this assignment, the opinion recognizes both the equitable nature of the liability there charged and the limited scope of the Johnson decision. It recites, however, the above-quoted review in that opinion of the premises and rule of the Texas decisions, and expressly approves and adopts them, as applicable in the federal court there sitting. In reference to the charge for betterments, the opinion is explicit in approval of direct liability, subject to the right of the company to "have the aid of a court of equity to restrict its liability to that amount," upon showing that the claims exceeded the betterments. We understand that the decision, although not expressly so defined, rests upon this view: That the local law establishes the obligation assumed by the successor, who takes over the property and fund from a receivership with assumption of liabilities, to be one of direct liability, and not merely equitable, for payment of claims chargeable against the fund; and that the direct liability so affixed determines the nature of the cause of action in the federal court, and it becomes enforceable there at law. With the adoption of the direct liability rule of Texas, the remedy may be administered at law, within the settled principles of that jurisdiction; and if question is open as to the bearing or effect of the rule when arising in equity jurisprudence, it is not pertinent on this review.

These decisions are applicable, as we believe, both to the equitable state of facts averred in the present declaration—with their effect

strengthened by the special admission on the part of this defendant in error, in paragraph 6 of its petition for possession of the railroad, "that it is legally liable for all the obligations imposed by said decree"—and to the *lex fori*, as settled by the Illinois decisions.

As before mentioned, it has long been the established law of Illinois that one person who contracts with another to assume an indebtedness of the latter to a third person becomes directly and primarily liable to such third person, who may sue at law upon the promise (*Union Life Insurance Co. v. Hanford*, *supra*, and cases cited); and such rule is general, not limited to mortgage indebtedness assumed by a grantee (*Eddy v. Roberts*, 17 Ill. 505, 508; *Thompson v. Dearborn*, 107 Ill. 87, 92).

In *Bartlett v. Cicero Light Co.* (decided in 1898) 177 Ill. 68, 73, 52 N. E. 339, 42 L. R. A. 715, 69 Am. St. Rep. 206, the question of the defendant's liability, in a suit at law, arose under circumstances singularly identical with those stated in the above-cited Texas cases, and the opinion cites and adopts the rulings of the Supreme Court of Texas thereupon, with special reference to *Texas & Pacific Ry. Co. v. Johnson*, 76 Tex. 421, 13 S. W. 463, 18 Am. St. Rep. 60, which was subsequently affirmed by the Supreme Court of the United States, as above referred to. Not only was direct liability upheld and rested on equitable considerations which would not support such liability under the general doctrine, and in no sense distinguishable in principle from those averred in the present case, but the decision is unmistakably brought within the rulings of the United States Supreme Court in both Texas cases. The opinion is well considered and unanimous. Its doctrine is reaffirmed in subsequent cases (see *Knickerbocker v. Benes*, 195 Ill. 434, 443, 63 N. E. 174, and its application in *Wabash R. R. Co. v. Stewart*, 41 Ill. App. 640, to facts like those involved here), and unquestionably settles the law of Illinois, as resting direct and personal liability upon grounds purely equitable under the general rule, and thus establishes the case at bar within the distinction upon which both the *Bloom Case* and *Union Life Insurance Co. v. Hanford*, *supra*, are understood to authorize recovery at law, namely, enforcement of the direct liability created by the state law out of these equities, with no blending of procedure in law and equity thereby recognized.

In *Thompson v. Northern Pac. Ry. Co.*, 93 Fed. 384, 35 C. C. A. 357, like suit at law was upheld against the purchaser alone, upon similar state of facts, with the exception that leave to sue was granted upon the equity side of the court, having ancillary jurisdiction of the foreclosure decree under which the sale was made. It was there contended: (1) That the complaint stated no cause of action at law; and (2) that writ of error did not lie, because in reality an equitable proceeding, "although in form an independent action at law." The opinion, however, overrules both contentions, and expressly states that the proceeding was not equitable, but was an action at law, and was thus maintainable upon the obligation assumed by the purchaser. Whether jurisdiction at law rested on the leave so granted, local rule, or otherwise, is not discussed.

The remaining objection of duplicity, assigned in the demurrer, is untenable. The twofold facts averred as grounds of liability, by way of express assumption, and in succession to improvements and betterments made by the receivers, are connected, not independent, and thus state, or tend to state, a single cause of action under the rules of pleading. 1 Chitty on Plead. (16th Am. Ed.) 249; Stephens on Pleadings (3d Am. Ed.) 248, 249.

The judgment of the Circuit Court is not in conformity with the foregoing view, and is reversed accordingly; and the case is remanded, with direction to set aside the judgment and overrule the demurrer to the amended declaration, for further proceedings in conformity with law.

(156 Fed. 746.)

GOSS v. CARTER.

(Circuit Court of Appeals, Fifth Circuit. October 28, 1907.)

No. 1,617.

1. CORPORATIONS—STOCKHOLDERS' LIABILITY—SUIT BY RECEIVER IN FOREIGN JURISDICTION.

Under Neb. Const. art. 11b, § 7, which provides that every stockholder in a banking corporation shall be individually liable to its creditors over and above the amount of his stock to an amount equal to his stock, which, as construed by the Supreme Court of the state, is self-executing and enforceable only after the assets of the corporation have been exhausted, by means of a suit in equity in behalf of all creditors against the corporation and its stockholders, in which all equities shall be adjusted, the total liabilities of the corporation ascertained, and a receiver or trustee appointed to collect from each stockholder his pro rata share of such liabilities, the amount due from the stockholders when so ascertained constitutes a trust fund, the legal title to which is vested in the receiver or trustee appointed, and he may maintain an action to recover the amount due from a stockholder in a foreign jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2280½.]

Stockholders' liability to creditors in equity, see notes to Rickerson Roller-Mill Co. v. Farrell Foundry & Machine Co., 23 C. C. A. 315; Scott v. Latimer, 33 C. C. A. 23.]

2. SAME—SUIT TO ENFORCE STOCKHOLDERS' LIABILITY—CONCLUSIVENESS OF DECREE.

In such an equity suit, each stockholder is represented by the corporation, having contracted with reference thereto, and is bound by the decree therein, although a nonresident of the state and not personally served with process.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2280½.]

3. SAME—ACTION AGAINST STOCKHOLDER—LIMITATION.

Limitation does not begin to run in favor of a stockholder against an action to enforce an assessment made against him under such constitutional provision until the entry of the decree fixing the amount of such assessment.

In Error to the Circuit Court of the United States for the Southern District of Texas.

This is an action brought by Charles A. Goss, a citizen of the state of Nebraska, against O. M. Carter, a citizen of the state of Texas. The plaintiff sued as receiver and trustee to recover from the defendant the amount of an assessment of 25.9 per cent. levied by the District Court of the Fourth Ju-

dicial District of the state of Nebraska upon \$101,900 of stock alleged to be owned by the defendant in the American Loan & Trust Company, an insolvent bank organized under the Constitution and laws of Nebraska. In the Circuit Court a general demurrer with special exceptions to the petition was sustained, and the case is brought by the plaintiff to this court on writ of error. The general question presented to this court by the assignments of error is: Did the Circuit Court err in sustaining the demurrer to the plaintiff's petition? This involves three inquiries: (1) Has the plaintiff as a receiver appointed in Nebraska the right to sue in Texas? (2) Is the defendant subject to suit on the decree of the Nebraska court? (3) Is the right of action barred by the Texas statute of limitations of four years?

The allegations of the petition bearing upon the questions raised by the general demurrer and special exceptions to it and by the assignments of error necessary to be decided are substantially as follows:

(1) The American Loan & Trust Company was a banking corporation organized under the laws of the state of Nebraska, and having an issued and fully paid capital stock of \$400,000, divided into 4,000 shares of \$100 each; and of these shares the defendant Carter owned 1,019. Said company became insolvent, and on May 10, 1894, a receiver was appointed by the Circuit Court of the United States for the District of Nebraska to liquidate its affairs. Such receivership was closed, and the suit wherein it was pending was terminated, September 28, 1898; the assets of the company having been exhausted without paying any portion of its indebtedness. The Circuit Court refused to entertain petitions in intervention offered by some of the five creditors hereinafter mentioned, having for their object the enforcement of the constitutional liability of the shareholders; but they were permitted to prove up their respective claims and to reduce the same to judgments, and they did so.

(2) Immediately upon the termination of the receivership suit in the United States Circuit Court for the District of Nebraska, the five creditors, Hamilton National Bank, Rutland County National Bank, Safety Fund National Bank, Gerard C. Tobey and New York Life Insurance Company, instituted in the District Court of the Fourth Judicial District of Nebraska a suit against American Loan & Trust Company and numerous persons alleged to be the stockholders, including the defendant Carter. By their amended petition filed in the suit October 4, 1898, the plaintiffs prayed that an order be made fixing a time within which other creditors of said American Loan & Trust Company might appear in said suit; that an account be had of the amount due each of said plaintiffs by said American Loan & Trust Company; that the several defendants sued as shareholders of said company be adjudged to be liable to the plaintiffs and to the other creditors of said company, over and above the amount of stock held by them, to a sum equal to the stock so held by them, for all the liabilities of said company accruing while they remained such stockholders; that the dates of the accrual of the debts due the several creditors be ascertained; that the amounts of stock held by the several defendants, and the periods of time during which such amounts were held, be determined; that the entire amount of the indebtedness of said company, in so far as the same might be represented in said suit, and the dates of the accrual thereof, and the names of the several stockholders at such dates, together with the amounts of such holdings, be determined; that the plaintiffs and such other creditors as might join in said suit have judgment against the several defendants to the extent of their liability; that a receiver be appointed to collect from said stockholders, under the authority and direction of the court, by execution or by other proper writ or process or by suit if necessary, or by such other proceedings as might be required fully to realize from said stockholders the amounts so found due said creditors, sufficient funds fully to pay and to satisfy the several amounts due to said creditors, with interest and costs, as well as the amounts due to such other creditors as might join therein; and they prayed for such other and further relief in the premises as might be just and equitable. No other creditors ever joined in said suit, or proved up their claims therein, or in any way became parties thereto.

(3) Process was served upon American Loan & Trust Company and upon several of the individual defendants, and the company and several individual de-

defendants appeared and resisted the suit. A protracted litigation ensued, in which the principal subject of dispute was the question whether the company was such a banking corporation as that under the Constitution of Nebraska the shareholders were liable for the debts of the company over and above the amount invested in their respective holdings of stock. The defendant, Carter, was not served, because not found, and he did not appear in the suit.

(4) In pursuance of a prayer of said amended petition, the plaintiff, Charles A. Goss, was appointed by said court by an interlocutory order made October 5, 1898, to be a temporary receiver in said suit, with authority to take such action as might be necessary to preserve the rights of the creditors against the estate of certain deceased shareholders, but without authority to proceed generally to collect the sums for which shareholders might be liable.

(5) On or about December 22, 1900, a decree was entered by said District Court in favor of the defendants, said court adjudging that no liability existed upon the part of the shareholders of said company. The plaintiff appealed from said decree to the Supreme Court of the state of Nebraska, which, on or about October 22, 1902, reversed the same and remanded the cause to the District Court for further proceedings. Thereafter another trial was had in said District Court, and on or about June 10, 1903, a final decree was entered whereby the shareholders of said company were adjudged to be liable to the creditors thereof for such amount, not exceeding sums equal to their respective holdings of stock, as might be necessary to discharge the indebtedness of said company, together with interest and costs.

(6) By said decree it was judicially ascertained, and such were the facts, that the corporate property of said American Loan & Trust Company had been exhausted before the commencement of said suit, and that after the exhaustion of such corporate property, and at the date of said decree, said company was still liable to the plaintiffs in said suit in certain sums whose several amounts and dates of accrual were duly ascertained. The aggregate of these items of indebtedness was \$74,283.84, besides the costs of suit. It was further judicially ascertained by said decree, and such was the fact, that at the date thereof the sums due by American Loan & Trust Company to the five original plaintiffs in said suit constituted the entire indebtedness and liability of said company then outstanding and unpaid.

(7) By said decree, it was further adjudged, and such was the fact, that continuously from a date prior to the accrual of any of the claims of the said five plaintiffs certain named parties defendant in this suit had owned and held certain shares of the stock of American Loan & Trust Company, their aggregate holdings being 4,000 fully paid shares. Among the persons found to have been shareholders during the time of the accrual of all of the claims sued upon was the defendant, O. M. Carter, who was found to have owned during all of said time 1,019 shares, amounting to \$101,900. By said decree it was further adjudged, and such was the fact, that American Loan & Trust Company was a duly incorporated banking institution, each of whose stockholders was liable individually to its creditors, over and above the amount of stock by him held, to an amount equal to the stock by him held for all the liabilities of said company accruing while he remained such stockholder.

(8) By said decree it was further adjudged that, in order to satisfy the indebtedness of said corporation, with interest and costs, it was necessary to collect from each of the solvent holders of the stock of said company a sum equal to 38.4 per cent. of his total liability. And it was ordered and decreed that each of the defendant shareholders pay to the said Charles A. Goss, as receiver and trustee, for the use and benefit of said five creditors pro rata, an amount equal to the shares of stock found to have been held by him, or so much thereof as might be required to satisfy the claims of said creditors, with interest and costs. A first assessment of 38.4 per cent. was levied by said decree; but, this assessment having been found to be excessive by reason of an error in computation, afterwards, to wit, on December 17, 1904, it was reduced to 25.9 per cent.

(9) By said decree it was further ordered and decreed that Charles A. Goss, the plaintiff herein, who theretofore had been appointed temporary receiver on October 5, 1898, should be, and thereby was, continued in office with all the powers and authority wherewith he was clothed by said order of October 5,

1898, and that, in addition to such powers and authority, he was further invested as trustee for the said creditors, to wit, for Hamilton National Bank, Rutland County National Bank, Safety Fund National Bank, Gerard C. Tobey, and New York Life Insurance Company, with the ownership of the legal title to all the rights of action under said assessment of 38.4 per cent., and under all other assessments that subsequently might be made by the court, with power, authority, and jurisdiction as such receiver and trustee to collect by execution, or by suit, if necessary, in his own name as receiver and trustee, in any court anywhere, or otherwise, from each of said stockholders the full amount of said assessment and of such other assessment as thereafter might be made by the court, until the full sum found to be due to said creditors, with interest and costs, should be collected and paid, or until the entire liability of each and all of the solvent defendants should be exhausted.

(10) By said decree it was further ordered and decreed that said suit should be, and thereby was, held upon the docket of said court, and that jurisdiction thereof and of the parties thereto should be and was retained for the purpose of entertaining application for the making of such other and further orders and assessments as might be requisite to obtain the full satisfaction and payment of the debts due to the said creditors, with costs.

(11) The plaintiff herein, Charles A. Goss, on June 10, 1903, accepted the appointment made by said decree, and on June 16, 1903, he filed his bond in accordance with the terms of said decree, and duly qualified as receiver and trustee in pursuance thereof.

(12) From the decree rendered by the District Court June 10, 1903, as aforesaid, American Loan & Trust Company and several individual defendants in due season appealed to the Supreme Court of the state of Nebraska. By the Supreme Court said decree was affirmed on or about June 9, 1904. A motion for the rehearing of the cause by the Supreme Court was duly filed by the appellants, and was overruled November 16, 1904, by said court, which issued its mandate to the District Court on or about November 28, 1904. Said mandate was filed in the District Court on or about December 13, 1904.

(13) Said decree was entered at the instance and suit of Hamilton National Bank, Rutland County National Bank, Safety Fund National Bank, Gerard C. Tobey, and New York Life Insurance Company, who were the plaintiffs in said cause, and who at the time of the rendition of said decree were the only creditors of said American Loan & Trust Company, and who as such alone were entitled to the benefit of all the liability imposed by the Constitution of the state of Nebraska upon the owners and holders of stock in said company and of all the liability assumed and undertaken by the owners and holders of stock in said company by virtue of their subscription therefor and of their acceptance of certificates issued therefor by said company. Said decree was entered with the full knowledge and consent of each and all of said creditors, and no one of them made any objection thereto. An appeal was taken from said decree by parties defendant in said suit, and all of said creditors appeared in the Supreme Court of the state of Nebraska, and there maintained the correctness of said decree and procured by their efforts its affirmance by said Supreme Court. Ever since its rendition and affirmance they have ratified said decree with all its terms and conditions, and have taken the benefit thereof. By virtue of the provisions of the Constitution of the state of Nebraska, as construed and applied by the Supreme Court of that state, the liability of the shareholders of said American Loan & Trust Company was constituted trust fund for the benefit of all of the creditors of said company. By virtue of said decree, and of the circumstances under which the same was rendered and affirmed as aforesaid, the plaintiff herein, Charles A. Goss, has been made the trustee to execute the trust and administer the trust funds established as aforesaid, and has been vested with the legal title to all rights of action growing out of the liability of the shareholders of said American Loan & Trust Company and of all assessments made for the enforcement thereof.

(14) After the Supreme Court had affirmed said decree of the District Court, and overruled the motion of the appellant for a rehearing of the cause and had issued its mandate to the District Court, the plaintiffs in said suit filed in the District Court on or about December 8, 1904, a motion wherein they averred that the assessment of 38.4 per cent. levied by said decree upon the stockholders was greater than probably would be needed; the amount of said

assessment having been fixed at 38.4 per cent. by reason of a mistake in computation. By said motion the plaintiffs prayed that the decree be amended and corrected, so that the first assessment should be of 25.9 per cent. of the par value of the shares of stock held by each shareholder, instead of 38.4 per cent. Due notice was given of said motion to all parties who had been served, or had appeared in the case; and upon the hearing thereof on or about December 17, 1904, an order was entered so amending said original decree of June 10, 1903, as to levy upon the par value of the shares of stock held by each shareholder in said American Loan & Trust Company a first assessment of 25.9 per cent., and no more, in lieu of the first assessment of 38.4 per cent. originally levied by said decree.

(15) Thereafter, on or about January 11, 1906, in said District Court of the Fourth Judicial District of the state of Nebraska, the plaintiff herein, Charles A. Goss, filed as receiver and trustee a petition for the construction of said original decree of June 10, 1903, praying that the court interpret said decree, and instruct said receiver and trustee whether the assessment levied upon the shareholders by said decree as amended was levied against each and all of the shareholders of said American Loan & Trust Company, or only against such of said stockholders as were not found in said decree to be insolvent. On or about January 13, 1906, in response to such petition, said decree was interpreted by said District Court, and an order was entered, whereby this plaintiff, as receiver and trustee, was directed to collect from each and all of the stockholders of said American Loan & Trust Company said first assessment of 25.9 per cent. of the par value of the stock by them severally held; such being the true intent and meaning of said original decree.

(16) On or about January 13, 1905, an execution was duly issued by the District Court of the Fourth Judicial District of the state of Nebraska upon said original decree of June 10, 1903, as amended, whereby the sheriff of Douglas county, Neb., was commanded to levy of the goods and chattels in his county of each of the defendants in said suit a sum equal to 25.9 per cent. of the par value of the stock by him held for the satisfaction of the indebtedness of American Loan & Trust Company to the plaintiffs in said suit and of the costs therein incurred. Said execution on or about January 15, 1905, was returned unsatisfied, no property having been found belonging to any of the defendants upon which to levy the same. Thereafter, on December 13, 1905, the present action was begun by the filing of an original petition therein in the Circuit Court of the United States for the Southern District of Texas.

The defendant's demurrer to the petition raised the questions which are stated above and discussed in the opinion.

Maurice E. Locke (James H. McIntosh, John Charles Harris, Edward F. Harris, and Eugene P. Locke, of counsel), for plaintiff in error.

W. G. Love and J. C. Hutcheson, Campbell & Hutcheson, for defendant in error.

Before McCORMICK and SHELBY, Circuit Judges, and NEWMAN, District Judge.

SHELBY, Circuit Judge (after stating the facts as above). The decision which we have determined to make in this case we think is sustained, if not required, by the opinion of the Supreme Court in *Bernheimer v. Converse* (decided May 27, 1907) 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163, after the learned trial judge had sustained the demurrer to the petition.

1. It is held by the Supreme Court in *Booth v. Clark*, 17 How. 322, 15 L. Ed. 164, and in later cases, that a chancery receiver, having no other authority than that which arises from his appointment, cannot maintain an action in another jurisdiction. It is contended that the rule established in these cases is applicable to the plaintiff here, and

that, as he is a receiver appointed in Nebraska, he cannot maintain an action in Texas. It is important, therefore, to ascertain whether he is vested by law with other rights than merely those conferred on him as a chancery receiver. The plaintiff was made receiver by the Nebraska court as a part of the procedure to enforce liabilities of stockholders fixed by the Constitution of Nebraska. The sections in question are parts of article 11b, and are as follows:

"Sec. 7. Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder; and all banking corporations shall publish quarterly statements under oath of their assets and liabilities."

"Sec. 4. In all cases of claims against corporations and joint stock associations, the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted the original subscribers thereof shall be individually liable to the extent of their unpaid subscription, and the liability for the unpaid subscription shall follow the stock."

These provisions are self-executing. They require no supplementary legislation. The liability imposed by them is a trust fund for the benefit of all creditors of the corporation. The only proper way to enforce the liability is by suit in equity in behalf of all the creditors against the corporation and stockholders, in which suit all equities should be adjusted and a receiver or trustee appointed to collect from each his pro rata share of the total indebtedness of the corporation for the benefit of all the creditors. This constitutional liability of the stockholders cannot be enforced till the indebtedness of the corporation is judicially ascertained and the assets of the corporation exhausted by legal process. The following are among the Nebraska cases which place these constructions on the Nebraska Constitution: *Farmers' Loan & Trust Co. v. Funk*, 49 Neb. 353, 68 N. W. 520; *State v. German Savings Bank*, 50 Neb. 734, 70 N. W. 221; *German National Bank v. Farmers' & Merchants' Bank*, 54 Neb. 593, 74 N. W. 1086; *Van Pelt v. Gardner*, 54 Neb. 701, 75 N. W. 874; *Hastings v. Barnd*, 55 Neb. 93, 75 N. W. 49; *Brown v. Brink*, 57 Neb. 606, 78 N. W. 280; *Hamilton National Bank v. American Loan & Trust Co.*, 66 Neb. 67, 92 N. W. 190; s. c. on second appeal, 72 Neb. 81, 100 N. W. 202. The plaintiff appointed in such proceeding is not a mere custodian of property, but he is clearly vested with the legal title. The terms of the Nebraska Constitution point out a trust fund in the event of the insolvency of the corporation. The construction placed on the Constitution by the Nebraska courts makes a receiver or trustee necessary to the enforcement and administration of the trust. When appointed, he has the legal title to the trust fund, with the power and charged with the duty to collect it for the creditors of the corporation. He represents all the creditors entitled to share in the fund. In such case the receiver can sue in a foreign jurisdiction. *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 761, 51 L. Ed. 1163; *Howarth v. Lombard*, 175 Mass. 570, 579, 56 N. E. 888, 49 L. R. A. 301; *King v. Cochran*, 76 Vt. 141, 56 Atl. 667, 104 Am. St. Rep. 922; *Glenn v. Soule* (C. C.) 22 Fed. 417.

2. A question is raised as to the effect of the decree on which this

suit is brought. It may be stated as a general rule that a stockholder is a part of the corporation to the extent that he is privy to the proceedings to which the corporation was a party, and that he is bound by a decree of a court against the corporation in the enforcement of a corporate duty, although not a party as an individual, but only through representation by the company. *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220. In *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184, an assessment ordered by a court which had jurisdiction of the corporation was held binding on the stockholders residing in another state, although not made parties as individuals. The assessment sued on in that case was on a subscription for stock, but the principle involved here is the same. When the defendant became a stockholder in the American Loan & Trust Company, it is presumed that he did so with knowledge of the laws of Nebraska which controlled the company. By those laws, as a stockholder, he became individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to the stock so held for all of the company's liabilities accruing while he remains a stockholder. This liability is not only statutory, but it is contractual; the law imposing the liability being a part of the contract of the stockholder with the corporation. The Nebraska Constitution also provides the conditions upon which this liability was to be enforced. It is a liability secondary in its nature, to be enforced only when necessary to protect the corporation's creditors. The exact amount of the claims against the corporation must be first judicially ascertained, the assets of the corporation exhausted, and the amount required by each stockholder necessary to satisfy the company's unpaid debts must be also judicially ascertained. Such is the effect of the sections of the Nebraska Constitution which we have quoted, as construed by the Supreme Court of the state. The defendant, having contracted with reference to these requirements, is bound by them, and in a proceeding to enforce them he is represented by the corporation. He is necessarily bound by all valid proceedings had pursuant to the statute which controls the settlement of the affairs of the corporation. *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301; *King v. Cochran*, 76 Vt. 141, 56 Atl. 667, 104 Am. St. Rep. 922; *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163.

What we have said on this point is sufficient for the decision of this case; for it is now presented to us on a ruling upon a demurrer to the petition. As to what defenses may be made to a suit on a decree like the one in question is not now to be decided. The main reason for holding the decree making the assessment binding on the stockholder is that his obligation is contractual, and that it contemplates the possibility of an assessment by a court. The defendant would, of course, be allowed to impeach the decree of assessment for fraud, and it has been said that such decree does not cut off defenses personal to the stockholder; that, for example, he may show that he is not a stockholder, or that he is not a stockholder for so large amount as is alleged. But we are of opinion that, as a member of the corporation, the defendant is bound, without personal notice to him, by the decision of the courts of the state where the corporation is organized, made in the

administration of its affairs on its insolvency, determining the amount of its assets and liabilities and the amount of assessment which should be made on its stockholders. Being so bound, a demurrer to the petition because the defendant was not individually served with process in the Nebraska suit should have been overruled.

3. It is contended that the right of action is barred by the statute of limitations of four years. Rev. St. Tex. 1895, § 3356. The stockholder's liability which this suit is brought to enforce is secondary and conditional. It is based on the Nebraska Constitution, which we have quoted, and, while the corporation's creditors are permitted to take steps to settle the affairs of the corporation and fix the exact amount of such secondary liability, they are not permitted individually or in groups to sue for the liability to satisfy their own claims. It appears from the petition that the amount sued for was not decreed against the defendant till June 3, 1903. The suit was brought in the Circuit Court December 13, 1905, which is in less than four years of the date of the decree sued on. The statute of limitations did not begin to run till the decree of assessment was rendered and the receiver appointed. *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163. The petition does not show that the suit is barred by the statute of limitations of four years, and therefore it is not amenable to demurrer on that ground.

The judgment of the Circuit Court is reversed, and the case is remanded, with instructions to overrule the demurrer to the petition and to grant a new trial.

(156 Fed. 753.)

NOYES v. MARLOTT et al.

(Circuit Court of Appeals, Ninth Circuit. November 4, 1907.)

No. 1,438.

1. LOGS AND LOGGING—SALE OF LOGS—TRANSFER OF TITLE AS BETWEEN PARTIES—DELIVERY.

Plaintiffs entered into a contract with defendant to fell, cut, raft, drive, and deliver a certain number of feet of logs of specified dimensions and quality in a slough extending from a river, where defendant agreed to construct a boom for their detention, to remove them to the banks of the river or to the mill, and at the time of such removal to scale the same and pay for each thousand feet so delivered and removed to the banks of the slough or the mill, "and not otherwise." A portion of the logs were so delivered, removed, and paid for; but the remainder, after being delivered into the boom, were carried away by a freshet and lost. *Held* that, plaintiffs having done all that they were to do, complete possession and title to the logs thereupon passed to defendant, and he became liable for the purchase price on proof of the quantity delivered, and that they conformed to the requirements of the contract as to dimensions and quality.

2. SAME—CONSTRUCTION OF CONTRACT.

A provision, in a contract for the sale and delivery of logs to be scaled after delivery, that they shall be of merchantable timber, is not a warranty that all logs delivered thereunder are merchantable, but merely furnishes a description for the identification of such logs as fall within the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Logs and Logging, § 104.]

3. EVIDENCE—PAROL EVIDENCE TO VARY WRITING—CONTRACT OF SALE.

Where the provisions of a written contract of sale are clear and intelligible, parol evidence of prior conversations between the parties is not admissible to prove an intention inconsistent with the writing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1787, 1793.]

4. SAME—EXISTENCE OF CUSTOM.

Where the provisions of a written contract of sale are clear and unambiguous, they cannot be changed or affected in meaning by proof of a custom at variance therewith.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1945–1952.]

In Error to the District Court of the United States for the Third Division of the District of Alaska.

Bion A. Dodge, Louis K. Pratt, and Jacob Samuels, for plaintiff in error.

McGinn & Sullivan, J. C. Campbell, W. H. Metson, Frank C. Drew, C. H. Oatman, and J. A. Mackenzie, for defendants in error.

Before GILBERT, Circuit Judge, and DE HAVEN and HUNT, District Judges.

HUNT, District Judge. Defendants in error, Marlott, Melvin, and O'Mealey, brought this suit to recover the contract price of certain logs alleged to have been delivered by them to Noyes, plaintiff in error, in accordance with the provisions of a certain written contract entered into on September 23, 1904. The contract is substantially as follows:

"This agreement made this 23d day of September, 1904, by and between Fred G. Noyes, party of the first part, and Tony O'Mealey, John Melvin, and Arthur Marlott, parties of the second part, witnesseth: (1) That said parties of the second part agree to fell, cut, raft, drive and deliver not less than six hundred thousand (600,000) feet of logs of the approximate dimensions hereinafter described, in the channel or slough of the Chena river, a tributary of the Tanana river, in the district of Alaska, leaving said river, immediately below the unincorporated town or settlement of East Fairbanks, about a quarter of a mile above and opposite the town of Fairbanks, in the district of Alaska, Third Division, and to furnish all necessary provisions, tools, tackle, apparel and booms for the purpose thereof. Two hundred thousand (200,000) feet of such logs shall be so delivered immediately after the clearing of the ice from the said Chena river, and the said slough, in the spring of 1905; and two hundred thousand (200,000) feet more shall be so delivered within thirty (30) days thereafter; and the remainder of two hundred thousand (200,000) feet shall be so delivered within sixty (60) days thereafter. 15 per centum of said logs shall be 12 feet in length. 10 per centum of said logs shall be 14 feet in length. 25 per centum of said logs shall be 16 feet in length. 10 per centum of said logs shall be 18 feet in length. 10 per centum of said logs shall be 20 feet in length. 5 per centum of said logs shall be 22 feet in length. 5 per centum of said logs shall be 24 feet in length. 5 per centum of said logs shall be 26 feet in length. 5 per centum of said logs shall be 30 feet in length. 5 per centum of said logs shall be 36 feet in length. 5 per centum of said logs shall be 40 feet in length. All logs shall not be less than nine (9) inches in diameter at the smaller end, and shall be from three (3) to six (6) inches longer than the above-prescribed lengths; and in all respects shall be cut and trimmed in a workmanlike manner, of good form and of firm, sound and merchantable timber. The said party of the first part shall provide in the slough departing from the Chena river into which said logs shall be diverted, as aforesaid, the necessary boom for the arresting and detention

of said logs, and shall remove them to the banks of said slough or to the mill, for the purpose of manufacturing the same into lumber, and at the time of such removal from said slough, shall scale them by 'Scribner's Rule,' at which time the said party of the first part shall pay to the said parties of the second part the sum of twenty dollars for each and every thousand of the logs so delivered in said boom and pulled therefrom to the banks, as aforesaid, or in the mill, for the purpose of manufacturing, as aforesaid, and not otherwise."

The answer admitted the agreement as set forth in the complaint, set up failure to fulfill the terms of the contract, and pleaded that about June 20, 1905, continuous and unprecedented rainfalls occurred, that extraordinary rise of the waters of the country thereabouts followed, and that the banks of the river and slough were cut away by the torrents of water, and the retaining boom, which had been erected by plaintiff in error, was washed out, and the logs called for by the contract were carried away without fault of the plaintiff in error.

It appears that about June 4, 1905, defendants in error had delivered into the detention boom of the plaintiff in error about 250,000 feet of logs, which were thereafter drawn from the slough by plaintiff in error, and defendants in error were given credit for the amount of feet ascertained. Thereafter, about June 29, 1905, the second drive of logs was made, and about 369,501 feet were put into the boom by defendants in error. On June 30th, the waters of the river began to rise, the boom which had been provided by plaintiff in error for the arrest and detention of the logs gave way, and the logs remaining in the slough were swept down the river and lost. The plaintiff in error had paid upon the contract price of the logs \$8,047.40, and, upon trial had before a jury, verdict was rendered in favor of the defendants in error, plaintiff's below, for \$5,083.02, balance claimed to be due. Judgment was entered accordingly. Motion for a new trial was denied. Plaintiff in error brings the case to this court by writ of error.

The record discloses that counsel for plaintiff in error tried the case upon the theory that the only feature of the contract to which the jury's attention should be addressed was that of a delivery; that is to say, he stood upon the proposition that the contract was executory, and that title to the logs did not pass until inspection, measurement, and pulling on to the banks. Defendants in error contended that they performed all of the acts required of them in the contract; that they put in the slough and boom designated in the contract the number, kind, and character of logs specified; that nothing was left for them to do; that plaintiff in error was to remove the logs from the slough, and to scale them, but that this was merely a means of determining the amount of compensation due to defendants in error for the logs; and that, as delivery had been made as required, title to the logs passed to plaintiff in error; hence that the peril to which the logs were exposed was plaintiff's.

The question, then, is: What was the effect of the contract of sale? Did the bargain amount to an actual sale, or was it only an executory agreement? If Noyes became the owner of the logs delivered into the channel or slough of the Chena river, where he had erected a boom to arrest and detain them, and they were afterwards lost, he

must be the sufferer. If, on the other hand, Marlott and his associates, whom we will call the loggers, had not parted with title, if they remained the owners of the logs until Noyes had pulled them out to the banks, and had scaled them for manufacturing purposes, then the contract was an executory one, and the loggers must bear the loss of the freshet.

Whether the logs passed or not is dependent upon the intention of the parties to the written contract, and that intention must be gathered from the language of the instrument and the subject-matter. In the ascertainment of the intention of the parties, we should consider, too, certain established legal rules. Thus, in *The Elgee Cotton Cases*, 22 Wall. 180, 22 L. Ed. 863, the court, in discussing executory and conditional sales, approved Benjamin's text by quoting the following rules laid down by Blackburn on Sales, and added to by Benjamin:

"First. 'When, by the agreement, the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property.'

"Second. 'Where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of these things shall also be a condition precedent to the transfer of the property, although the individual goods be ascertained and they are in the state in which they ought to be accepted.'

"Third. 'Where the buyer is by the contract bound to do anything as a consideration, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer.'"

And later on in the opinion the court distinguished the doctrine of the first and second rules by citing numerous English cases, and saying for itself:

"Of course, when nothing remains for the seller to do, when the weighing or measurement stipulated for is incumbent upon the buyer, or when the parties have provisionally agreed that a certain sum shall be taken for the price, subject to future correction, the contract is not within the rules. *Turley v. Bates*, 2 Holstone & Coltman, 200, has sometimes been thought a departure from the earlier cases, but we think without reason. It was the case of the sale of an entire heap of fire-clay at two shillings per ton. The buyer was to cart it away and weigh it. He weighed, removed, and paid for a part, and refused the rest. It was held the property of the whole heap had passed to him. But here the seller had nothing to do with the weighing or delivery. He had performed all he was required to do, either for ascertaining the quantity or the price. Besides, the jury had found as a fact that the sale was of the whole heap. The case of *Kershaw v. Ogden*, 3 Holstone & Coltman, 717, is in substance the same. In each of these cases the contract was in parol, and what it was necessarily for a jury."

Tested by these rules, the contract under consideration passed the ownership of the logs delivered in the slough when the loggers put them there. *Hatch v. Oil Co.*, 100 U. S. 124, 25 L. Ed. 554.

An ascertainment of the amount to be due was contemplated, but the loggers only undertook to deliver the quantity and kind of logs that they proved were put into the slough, as designated in the con-

tract. Referring to the language of the contract, it will be observed that the loggers were "to fell, cut, raft, drive and deliver" logs of certain dimensions and quality as specified. They did all these things and transferred complete title, possession, and control to Noyes. By the contract, the loggers were to furnish merchantable timber, but that provision was not a warranty of the logs on the part of the loggers, but was rather a provision for the benefit of the loggers and Noyes, sellers and purchaser, respectively, furnishing a description of what was bought and sold. When a contract very similar to the one we have before us was examined by the Supreme Court, it was said:

"Merchantable logs only were bought and sold by the parties, but it is a great mistake to regard that provision as a warranty of the logs on the part of the plaintiffs. Unless the parties were destitute of all experience, they must have known that in so large a lot of logs there would be some, and perhaps many, that would not scale as merchantable; and it was doubtless from that consideration that the provision was inserted, that the defendants should take all of that description, and, of course, they were not bound to take any of inferior grades. Regarded in that light, it is evident that the provision was for the benefit of both the seller and purchaser, as it furnished a clear and unmistakable description of what was bought and sold—we say bought and sold, because it is evident from what has already been said that the title to the logs passed to the defendants." *Leonard et al. v. Davis et al.*, 1 Black (U. S.) 476, 17 L. Ed. 222.

Noyes, the buyer, had constructed the boom to detain the logs, as he agreed to do, and from the time of the delivery in the slough he possessed and owned them. *Ludwig v. Fuller*, 17 Me. 166, 35 Am. Dec. 245. By the contract, Noyes was to remove the logs for manufacturing purposes. He was to remove and scale them, and was then to pay \$20 for every thousand of the logs that had been delivered by the loggers into the detention boom. But everything the loggers, as sellers, had to do with the logs, was completed when they delivered into the slough. *Leonard v. Davis et al.*, *supra*. After delivery, their only interest was in recovering the price agreed upon when the measurement was ascertained by Noyes, the purchaser.

A circumstance in the case to show that there was no condition in the sale is the fact that, after the logs in the first drive had been delivered in the slough, Noyes employed the loggers, defendants in error, to help him pull the logs onto the bank, and paid them daily wages for such service.

Stress is laid by plaintiff in error upon the words "and not otherwise," which conclude the provision of the contract defining the obligation of Noyes. But this phrase only emphasizes the immediately previously fixed and limited method of ascertaining a settlement of accounts. No other method was to be allowed. We do not think it can be regarded as qualifying the sale itself by making it conditional upon Noyes hauling the logs out and scaling them. In trusting to Noyes to ascertain the quantity of logs for which he was to pay, the loggers displayed confidence in him, but the sale was not affected, for the sellers had nothing to do to put the property into deliverable shape. It had been completely delivered. *King v. Jarman*, 35 Ark. 190, 37 Am. Rep. 11; *Albemarle Lumber Co. v. Wilcox*, 105 N. C. 34, 10 S. E. 871.

In *Macomber v. Parker*, 13 Pick (Mass.) 183, it was said:

"Where any operation of weight, measurement, or counting, or the like, remains to be performed, in order to ascertain the price, the quantity or the particular commodity to be delivered, and to put it in a deliverable shape, the contract is incomplete until such operation is performed; but, where the goods or commodities are actually delivered, that shows the intent of the parties to complete the sale by the delivery, and the weighing, measuring, or counting afterwards would not be considered as any part of the contract of sale, but could be taken to refer to the adjustment of the final settlement as to the price."

Plaintiff in error argues that, even if the court finds the contract was not a conditional one, still it was fairly susceptible of two interpretations, and that therefore explanatory evidence was admissible. Relying upon this premise, he has assigned error because the trial court denied an offer to prove conversations that were had between the loggers and Noyes that led up to the execution of the contract, and an offer of proof that when the contract was presented to the loggers for signature they demurred to signing it because it did not provide for delivery in the slough or boom alongside of the bank, whereupon Noyes told them that he would not be responsible for the logs in the slough or until they were pulled from the water, and they could sign the contract or not.

But if the court can ascertain from the language of the writing itself what the parties meant, then evidence of language employed before they expressed their intention in writing is on principle immaterial. *United States v. Bethlehem Steel Co.*, 205 U. S. 105, 27 Sup. Ct. 450, 51 L. Ed. 731. Our duty is to find out the true sense of the written words as the parties have used them, and then, as heretofore held, when that true sense is ascertained, test the writing in the light of established legal rules. If the agreement before us had been incomplete or unintelligible, explanation not inconsistent with its written terms would have been perfectly competent; but, as the writing is complete and intelligible, parol evidence of prior conversations to prove the intention of the parties inconsistent with its ascertained meaning was not proper. We are not losing sight of the necessity for interpretation, according to the subject-matter referred to in a contract, and of surrounding circumstances, and of the admissibility of verbal testimony in order to find out the subject to which a writing refers; but parol evidence to explain the nature of the subject of a written instrument is very different from evidence of verbal communications respecting the contract itself. A familiar illustration is where parol evidence is admitted to show that land in a deed is described as in one locality, while it really lies in another; or, where a factory has been conveyed as a factory, it is permissible to receive verbal testimony to show what part or parcel is passed by the deed. *Greenleaf on Evidence*, c. 15. Here the instrument does not present ambiguity in the true sense and meaning of the words themselves, or such difficulties as to their application as to have warranted investigation by evidence outside of the paper itself. We must therefore sustain the ruling of the lower court in rejecting the offer made.

Effort was also made by plaintiff in error to prove that a general cus-

tom existed among loggers and sawmill men in the Tanana Valley, whereby logs delivered at a mill are at the risk of the loggers and remain so until pulled from the water and scaled, and the amount determined; but the court sustained the objections of defendants in error and refused to allow such evidence. Plaintiff in error seeks to apply the rule that customary rights and incidents universally attaching to the subject-matter of a contract, where it is made, are annexed by implication to the language and terms of the contract, unless custom is expressly excluded. But the doctrine of evidence of custom cannot prevail over the express provisions of a contract. "Its true and appropriate office is to interpret the otherwise indeterminate intention of the parties, and to ascertain the nature and extent of their contracts arising, not from express stipulations, but from mere implications and presumptions and acts of a doubtful or equivocal character." *Bliven et al. v. New England Screw Co.*, 23 How. 420, 16 L. Ed. 510. It is enough to say that the real meaning of the contract, as interpreted by the words used, provided for a delivery at a particular place, and was not indeterminate, and therefore evidence of custom was irrelevant. *Barnard v. Kellogg*, 77 U. S. 383, 19 L. Ed. 987.

Other points of a minor character were made by plaintiff in error. They have been examined, and are largely covered by what we have already said. None appear to be well taken.

In conclusion, we believe that the proper construction of the contract is that the parties intended that Noyes should become the owner of the logs when actually delivered into the slough, and that, from the time of delivery so made, he was the owner and could have recovered the property, had it been attached under writ issued in an action brought by a creditor of the loggers. Accident was hardly contemplated; but, when it occurred, by the rules of law the owner must be the sufferer.

The judgment is affirmed.

(156 Fed. 759.)

BIDDLE v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 28, 1907.)

No. 1,463.

1. CRIMINAL LAW—JURISDICTION—UNITED STATES COURT FOR CHINA.

The object of Act June 30, 1906, c. 3934, 34 Stat. 814 [U. S. Comp. St. Supp. 1907, p. 797], creating the United States Court for China, and of the treaty under which it was created, in so far as that court is given criminal jurisdiction, was to secure to American citizens residing or sojourning in China and there charged with crime the benefit of the principles of the laws of the United States relating to the trial of persons accused of crime; but the statute at the same time makes such citizens subject to punishment for acts made criminal by any law of the United States or for acts recognized as crimes by the common law.

2. SAME—OFFENSES PUNISHABLE—OBTAINING MONEY BY FALSE PRETENSES.

The provisions of such statute, making the common law applicable to criminal offenses committed by American citizens in China, are to be construed as referring to the common law in force in the several American colonies at the time of their separation from England, and this in-

cluded not only the ancient common or unwritten law, but also statutes which had theretofore been passed amendatory of or in aid of the common law, among which was St. 30 Geo. II, c. 24, enacted in 1757, creating the offense of obtaining money or goods under false pretenses, and the subsequent amendments thereto.

3. **SAME.**

In view of the legislation of Congress making the obtaining of money or property by false pretenses a crime in Alaska and the District of Columbia and in other territory subject to the criminal jurisdiction of the United States, such act is an offense against the laws of the United States, within the meaning of Act June 30, 1906, c. 3934, 34 Stat. 814 [U. S. Comp. St. Supp. 1907, p. 797], conferring jurisdiction upon the United States Court for China, and an American citizen guilty of the commission of such act in China is subject to trial and punishment therefor by that court.

4. **FALSE PRETENSES—ELEMENTS OF OFFENSE—NATURE OF PRETENSES.**

To constitute the crime of obtaining money under false pretenses, the alleged false representation must be of some past or existing fact, and an information charging that a defendant obtained money from persons named as rental for a building, by means of false representations that the municipal authorities would permit gambling games to be played therein during a race meeting to be held in the future, is insufficient to charge an offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, §§ 5-12.]

Appeal from the United States Court for China.

Edwin H. Lamme and Francis Ellis, for appellant.

Robert T. Devlin, U. S. Atty., and Benjamin L. McKinley, Asst. U. S. Atty.

Before GILBERT, Circuit Judge, and DE HAVEN and HUNT, District Judges.

DE HAVEN, District Judge. This is an appeal by the defendant from a judgment of the United States Court for China, by which he was convicted of the crime of obtaining money under false pretenses, and sentenced to imprisonment for the term of one year in the jail at Shanghai.

It is claimed by the appellant: First, that the court below was without jurisdiction to try him for such alleged crime, because the act of obtaining money or goods by false pretenses was not an offense at common law, and is not made a crime by the laws of the United States; and, second, that the evidence was not sufficient to warrant his conviction.

1. The United States Court for China was created by Act June 30, 1906, c. 3934, 34 Stat. pt. 1, p. 814 [U. S. Comp. St. Supp. 1907, p. 797], and by section 1 of that act was given "exclusive jurisdiction in all cases and judicial proceedings whereof jurisdiction may now be exercised by United States consuls and ministers by law and by virtue of treaties between the United States and China, except in so far as the said jurisdiction is qualified by section two of this act." Section 4 of the same act provides:

"The jurisdiction of said United States court, both original and on appeal, in civil and criminal matters, and also the jurisdiction of the consular courts in China, shall in all cases be exercised in conformity with said treaties and

the laws of the United States now in force in reference to the American consular courts in China, and all judgments and decisions of said consular courts, and all decisions, judgments, and decrees of the United States court, shall be enforced in accordance with said treaties and laws. But in all such cases when such laws are deficient in the provisions necessary to give jurisdiction or to furnish suitable remedies, the common law and the law as established by the decisions of the courts of the United States shall be applied by said court in its decisions and shall govern the same subject to the terms of any treaties between the United States and China."

The law in relation to the jurisdiction of consular courts at the date of the passage of the act creating the United States Court for China is found in section 4086 of the Revised Statutes [U. S. Comp. St. 1901, p. 2769], and is as follows:

"Jurisdiction in both civil and criminal matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to execute such treaties, respectively, and so far as they are suitable to carry the same into effect, extended over all citizens of the United States in those countries, and over all others to the extent that the terms of the treaties, respectively, justify or require. But in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law and the law of equity and admiralty shall be extended in like manner over such citizens and others in those countries."

The United States, by its treaty with China, acquired extraterritorial jurisdiction in civil controversies between its citizens residing in China, and in respect to all crimes committed by its citizens residing there, and Congress, in the statutes above referred to, provided tribunals to exercise such jurisdiction, "in conformity with the laws of the United States," and when these laws "are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies," then in accordance with the common law. The object of the treaty and the intention of Congress, in creating the United States Court for China, in so far as that court is given criminal jurisdiction, was to throw around American citizens residing or sojourning in China, and there charged with crime, the beneficent principles of the laws of the United States relating to the trial of persons charged with crime—the rules of evidence, the presumption of innocence, the degree of proof necessary to convict, the right of the accused to be confronted with witnesses against him, exemption from being compelled to criminate himself, etc. But, while securing to them these privileges, the statute at the same time, made them subject to punishment for acts made criminal by any law of the United States, or for acts recognized as crimes under the common law.

This brings us to the consideration of the question whether obtaining money or goods by false pretenses is an offense which may be thus punished, if committed by an American citizen in China. This particular kind of cheating was not a crime under the ancient common law. It was first so declared in the year 1757 by St. 30 Geo. II, c. 24. Bishop on Criminal Law (3d Ed.) vol. 2, § 392. "Under this statute for the first time the crime ceased to depend on the particular kind of pretense used; the statute being couched in terms broad enough to include the use of any false pretense whatever, although, as will appear later, the judges, in construing the statute,

excepted certain classes of pretenses from it. It was this statute that created the crime now commonly known as obtaining goods under false pretenses. Several statutes have been enacted in England since the statute of 30 Geo. II to supply defects found therein, but its general provisions, in so far as they defined the crime, remain unchanged." 19 Cyc. 387.

If the statute of 30 Geo. II, and those amendatory of it, which were in force at the date of the separation of the American colonies from the mother country, are to be considered as a part of the common law to which Congress referred in the enactment above quoted, the jurisdiction of the court over the offense of obtaining money under false pretenses would be undoubted; and we are of opinion that in making the common law applicable to offenses committed by American citizens in China, and the other countries with which we have similar treaties, Congress had reference to the common law in force in the several American colonies at the date of the separation from the mother country, and this included not only the ancient common law, the *lex non scripta*, but also statutes which had theretofore been passed amendatory of or in aid of the common law. Thus Mr. Bishop, in his work on Criminal Law (section 155) says:

"The rule is familiar to the legal profession that colonists to an uninhabited country carry with them the laws of their mother country, as far as applicable to their new situation and circumstances; and that, in their new home, the laws thus taken with them, whether in the mother country they were written or unwritten, are regarded as unwritten, or common law."

And in the second edition of Cooley's Constitutional Limitations, (page 25), the author of that great work says:

"The colonies also had Legislatures of their own, by which laws had been passed which were in force at the time of the separation, and which remained unaffected thereby. When therefore they emerged from the colonial condition into that of independence, the laws which governed them consisted: First, of the common law of England, so far as they had tacitly adopted it as suited to their condition; second, of the statutes of England, or of Great Britain, amendatory of the common law, which they had in like manner adopted; and, third, of the colonial statutes. The first and second constituted the American common law, and by this in great part are rights adjudged and wrongs redressed in the American states to this day."

But in holding that the court below had jurisdiction of the information upon which the defendant was tried, it is not necessary for us to rest our decision entirely upon the proposition that obtaining money or goods under false pretenses is an offense at common law, within the meaning of the statute conferring jurisdiction upon the United States Court for China, as we are clearly of opinion that such an act is a crime under the laws of the United States.

It is true, there is no general statute applicable to every state in the Union, making this an offense against the United States; nor could there be, in view of the fact that under our system of government the right to punish for such acts committed within the political jurisdiction of the state is reserved to the several states. But in legislating for territory over which the United States exercises exclusive legislative jurisdiction, Congress has made the act of obtaining money under false pretenses a crime. Thus, in section 54 of title 1, pt. 1,

of the act passed March 3, 1899 (chapter 429, 30 Stat. 1260), entitled, "An act to define and punish crimes in the district of Alaska and to provide a code of criminal procedure for said district," Congress has enacted that obtaining money or property from another by any false pretense shall constitute a crime, subjecting the offender to punishment by imprisonment in the penitentiary not less than one nor more than five years. So, also, under section 842 of the act of March 3, 1901, entitled "An act to establish a code of law for the District of Columbia," obtaining from any person anything of value by means of false pretenses is made a crime, and, where the value of the property so secured is \$35 or upwards, subjects him to imprisonment not less than one year nor more than three years; or, if less than that sum, to a fine not more than \$200, or imprisonment for not more than six months, or both. Chapter 854, 31 Stat. 1326.

In addition to these statutes, section 2 of the act of July 7, 1898 (chapter 576, 30 Stat. 717 [U. S. Comp. St. 1901, p. 3652]), which is, in substance, a re-enactment of section 5391, Rev. St., provides:

"That when any offense is committed in any place, jurisdiction over which has been retained by the United States or ceded to it by a state, or which has been purchased with the consent of a state for the erection of a fort, magazine, arsenal, dockyard or other needful building or structure, the punishment for which offense is not provided for by any law of the United States, the person committing such offense shall, upon conviction in a circuit or district court of the United States for the district in which the offense was committed, be liable to and receive the same punishment as the laws of the state in which such place is situated now provide for the like offense when committed within the jurisdiction of such state, and the said courts are hereby vested with jurisdiction for such purposes; and no subsequent repeal of any such state law shall affect any such prosecution."

Under this statute, any act committed in any place under the jurisdiction of the United States, if made an offense by the laws of the state in which such place is situate, when committed elsewhere in the state, is an offense against the United States, and punishable as in the state law provided. *Sharon v. Hill* (C. C.) 24 Fed. 731; *U. S. v. Wright*, Fed. Cas. No. 16,774; *U. S. v. Pridgeon*, 153 U. S. 48-53, 14 Sup. Ct. 746, 38 L. Ed. 631.

At the date of the passage of the act of July 7, 1898, just quoted, the act of obtaining money or goods by false pretenses was made a crime by the laws of most of the states of the Union, and is, therefore, under this statute, also made a crime against the United States, in all places over which the United States exercises exclusive legislative jurisdiction, within the several states, having laws providing for the punishment of such an act as a crime.

In view of the legislation of Congress to which we have referred (the acts relating to Alaska and the District of Columbia, and the statute of July 7, 1898), our conclusion is that obtaining money or goods under false pretenses is an offense against the laws of the United States, within the meaning of the statute conferring jurisdiction upon the United States Court for China, and that an American citizen guilty of the commission of such an act in China is subject to trial and punishment therefor by that court.

2. But we are of opinion that the information upon which defend-

ant was convicted does not state facts sufficient to constitute the offense of obtaining money under false pretenses. The information, so far as is necessary to be here set out, charges that the defendant, "on or about the 31st day of October, 1906, in Shanghai, China, unlawfully and knowingly did falsely pretend to Woo Ah Sung, Zung Yu Young, Ng Sih Yiek, and Sz Yung that the municipal authorities of the international settlement of Shanghai, China, would allow and permit in the building known as Nos. 4 and 5 Mohawk Road, Shanghai, China, * * * Chinese gambling games to be played during the autumn race meeting of 1906, in Shanghai, China, which pretenses were false, as the said C. A. Biddle then and there well knew, and by said false pretenses the said C. A. Biddle, with intent to defraud, unlawfully did obtain from the said Woo Ah Sung, Zung Yu Dong, Ng Sih Yiek, and Sz Yung the sum of Tls. 3,000.00 Shanghai Sycee as rent for the said premises to be used for the said gambling games."

It will be noticed that the alleged false pretenses relate wholly to some future action of the municipal authorities of the international settlement of Shanghai in permitting Chinese gambling to be played during the autumn race meeting of 1906, in Shanghai. There is no averment that defendant made any false representation as to any existing fact, or past fact, and without such an averment the charge of obtaining money under false pretenses cannot be sustained. In order to constitute the crime of obtaining money under false pretenses, the alleged false representation must be of some past or existing fact. Says Mr. Bishop (section 401, vol. 2), in his work on Criminal Law (3d Ed.):

"Both in the nature of things, and in actual adjudication, the doctrine is that no representation of a future event, whether in the form of a promise or not, can be a pretense, within the statute, for the pretense must relate either to the past or the present."

This statement is well sustained by decided cases. *People v. Miller*, 169 N. Y. 339, 62 N. E. 418, 88 Am. St. Rep. 546; *Cook v. State*, 71 Neb. 243, 98 N. W. 810. Our attention has not been called to any case which holds to the contrary. *People v. Wasservogle*, 77 Cal. 173, 19 Pac. 270, which is cited by the learned attorney for the United States, is in harmony with the rule as we have stated it. In that case the defendant obtained money upon a draft drawn by him; he falsely stating at the time that he had credit with the firm upon which it was drawn, for the amount of the draft, and that the draft would be honored. In that case it will be perceived there was the false representation of an existing fact, to wit, that the defendant had an existing credit to the amount of the draft with the firm upon which the draft was drawn, and the court, in its decision upholding the conviction in that case, said:

"It is true that, to come within the statute, a representation must be of some fact, past or present; but the statement of the defendant that he had credit with the firm named for the amount of the draft, and that the firm would honor the draft, when he knew that he had no credit with the firm, and that the draft would not be honored or paid, was sufficient."

Passing from the information to a consideration of the evidence: It was wholly insufficient to justify the conviction of defendant. It appears that on May 29, 1906, the defendant in his own name, but in fact acting for the Hotel Metropole Company, Limited, entered into a contract with the firm composed of the Chinese named in the information, whereby the defendant "let during the four days of the autumn race meeting of 1906 the whole of the second floor and verandah of the building Nos. 4 and 5 Mohawk Road, for the purpose of running Chinese tables for the sum of tael six thousand—Tls. 6,000—fifteen hundred taels of which to be paid on the signing of the contract by the said Yik Che as bargain money, the balance to be paid on or before the first day of November, 1906. This contract to be null and void should the municipal authorities prohibit the running of the said building as a Chinese grand stand during said race meeting and the above mentioned fifteen hundred taels bargain money be returned to the said Yik Che."

It is very clearly shown by the evidence that, when the payments were made under this contract, the parties knew that gambling was not then permitted in Shanghai, and would not be during the approaching autumn race meeting of 1906, unless the municipal authorities should in some manner remove the prohibition. There was also some evidence tending to show that the council had refused, before the making of the above lease, to give its consent to the suspension of the ordinance against gambling in Shanghai, and that this fact was known to the defendant and not communicated by him to the lessees; and that he and others were endeavoring to get the council to recede from its position against gambling, during the time the several payments were made under this lease; but there was no evidence that defendant ever made any express or implied representation that the ordinance against gambling had been repealed or suspended. There was no false representation of any existing fact.

The judgment is reversed, with directions to discharge the defendant.

(156 Fed. 765.)

PENNSYLVANIA R. CO. v. INTERNATIONAL COAL MINING CO.

(Circuit Court of Appeals, Third Circuit. November 13, 1907.)

No. 14.

APPEAL AND ERROR—REVIEWABLE ORDERS—REQUIRING PRODUCTION OF DOCUMENTS.

An order made by a Circuit Court under Rev. St. § 724 [U. S. Comp. St. 1901, p. 583], requiring a party to an action at law to produce books or writings at the trial, is an interlocutory and not a final order, and is not reviewable on a writ of error prior to final judgment in the cause.

[Ed. Note.—Orders, decrees, and judgments reviewable. See note to *Salmon v. Mills*, 13 C. C. A. 374.]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 152 Fed. 557. See, also, 152 Fed. 554.

Francis I. Gowen, for plaintiff in error.

J. W. M. Newlin, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

GRAY, Circuit Judge. The International Coal Mining Company, the defendant in error, hereinafter called the plaintiff, brought its action in the court below against the Pennsylvania Railroad Company, the plaintiff in error, hereinafter called the defendant, under the interstate commerce act, to recover damages against the defendant, for its alleged violation of certain provisions of that act, by discriminating against the plaintiff in the allowance of freight rates upon coal.

To the statement of claim filed by plaintiff, defendant pleaded the general issue of "not guilty," the statute of limitations, and a special plea, which set up a judicial sale under a special fi. fa., issued in execution of a judgment rendered by a court of common pleas of the state of Pennsylvania, against the said plaintiff, the defendant in said judgment, it being alleged that, by virtue of said sale, the right of action under the interstate commerce act, as alleged in the case at bar, was sold, and plaintiff's title thereto divested, and that that fact was a bar to the further prosecution by the plaintiff of its suit. To this special plea, the plaintiff filed several replications, to which the defendant demurred. These demurrers were overruled, and, after an intervening continuance of the cause, and at that stage of the suit, upon the petition of plaintiff's attorney, the following order was made by the court below :

"And now, January 30, 1907, on the filing of the affidavit of J. Chester Wilson, secretary of the plaintiff and International Coal Mining Company, and on motion of James W. M. Newlin, attorney for the plaintiff, and for Edward D. McLaughlin, Esq., trustee in bankruptcy for plaintiff as an intervener, the court grants a rule on the defendant to show cause why it should not be required to produce on the trial of this cause the papers and writings specified in said affidavit or to satisfy the court why it is not in its power to do so, returnable February 13, 1907, at 10 a. m."

On the return day of the rule, the defendant made answer, suggesting, first, that the plaintiff was not entitled to the orders sought by it, because of the facts averred and set forth in the special plea filed by the defendant, and, second, that no warrant existed under the statutes of the United States for the making of any such order as was sought by the plaintiff in an action of the character of the present one, being an action to recover damages in the nature of penalties. On March 25, 1907, the court below filed an opinion, in which the objections urged in the defendant's answer were overruled, and, asserting the right of the court to make the order, as asked for by the plaintiff, it was said :

"The plaintiff in this case is entitled to the production of such books and papers as are relevant and pertinent to the issues involved ; but the court will not make the rule absolute, as the question of the relevancy of whatever books and papers are called for must be passed upon at the trial. It is ordered, therefore, that the defendant be required to produce the books and papers specified in the petition, at the trial of the cause, unless it shows cause at the trial why the same should not be produced."

On April 3, 1907, the court below filed the following opinion and order:

"On March 25, 1907, an order was made on the defendant in this case, to produce books and papers at the trial of the case. A petition had been presented, under section 724 of Revised Statutes [U. S. Comp. St. 1901, p. 583], by the plaintiff for the production of books and papers. The defendant made answer, with other matters, that the action being one for the recovery of damages, in the nature of a penalty under the interstate commerce act, the motion should be denied. The order to produce was not made absolute, but the question of requiring the production was left open for settlement at the trial. In this, I think the order was not in proper form. It was the intention of the court to require the production of the books, for the reason that the action is not for a penalty in a sense to exempt the defendant from the production of books in an action of this kind, and even if it be regarded as a suit for the recovery of damages as a penalty, or in the nature of a penalty, the defendant, being a corporation, is not entitled to the privilege of refusing to produce its books and papers in a suit of this kind. *Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652; *Nelson v. U. S.*, 201 U. S. 92, 26 Sup. Ct. 358, 50 L. Ed. 673.

"And now, April 2, 1907, on motion of James W. M. Newlin, for the plaintiff, and the answer, filed by the defendant to the rule returnable February 13, 1907, on the defendant to show cause why it should not produce upon the trial the documentary evidence set forth in the affidavit of J. Chester Wilson, the secretary of the plaintiff, upon which the rule to show cause was granted, having been determined by the court to be insufficient, it is ordered that the defendant shall produce the said documentary evidence at the trial of the cause, and the rule to show cause is made absolute."

Thereupon, April 4, 1907, the defendant filed his petition for a writ of error, which being allowed by the court below, the following assignments of error were duly filed:

"First. The Circuit Court erred in entering the order of March 25th, requiring the plaintiff in error to produce at the trial of the cause the books and papers referred to in said order.

"Second. The Circuit Court erred in entering the order of April 3d, requiring the plaintiff in error to produce at the trial of the cause the books and papers referred to in said order."

The return to the writ of error so sued out, brings before this court the record of the case, as far as it had proceeded in the court below, terminating with the order above referred to, of April 3, 1907, "that the defendant shall produce the said documentary evidence at the trial of the cause."

Prior to the argument on the assignments of error, the defendant in error, by its counsel, moved this court to dismiss the writ of error for want of jurisdiction, on the ground that the orders complained of in said assignments of error are interlocutory orders of the court below, and not final decisions of said court, within the meaning of section 6 of the judiciary act of March 3, 1891 (26 Stat. 1110, c. 566 [U. S. Comp. St. 1901, p. 339]). The plaintiff in error, however, contends that the said orders, one or both, are final, within the ratio decidendi of the judgment rendered by this court in the recent case of *Cassatt et al. v. Mitchell Coal & Coke Co.*, 150 Fed. 32, 81 C. C. A. 80. As both orders cannot be treated as final, we may consider the order of April 3, 1907, modifying that of March 25, 1907, as the order complained of in the assignments of error. This was an order, absolute on its face, to produce the books and papers set

forth in the petition of the plaintiff at the trial of the cause, and is prima facie in accordance with the authority conferred upon the court by section 724 of the Revised Statutes, which is as follows:

"In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant, as in cases of non-suit, and if a defendant fails to comply with such order, the court may, on motion give judgment against him by default."

The extent of the power conferred by this section upon trial courts, was fully considered by this court in the case above referred to, the pertinent facts of which are thus stated in its opinion:

"The defendant filed a plea that it was not guilty. After issue was thus joined, and before the time for the trial of the action, the plaintiff filed in the circuit court a petition, in which, after setting forth the nature of the action at law, and declaring that the defendant and Alexander J. Cassatt, president, John B. Thayer, fourth vice president, and 10 other specifically named officers and employes of the defendant, had in their possession or power certain books and papers containing evidence pertinent to the issue, there was a prayer for an order requiring the defendant, and its said officers and employes, to produce said books and papers at the trial, and also for the inspection of the plaintiff's representatives before trial. The application for the order was based on section 724 of the Revised Statutes. * * *

"With the petition and answer before it, the Circuit Court, on the return of the rule to show cause, 'adjudged, ordered and decreed' that Alexander J. Cassatt, president, John B. Thayer, fourth vice president, and 10 other officers and employes of the defendant, 'produce on the trial of this cause,' the books and papers described in the petition, and also that they produce them before trial at a specified time and place for the inspection of the plaintiff, with leave to the plaintiff to make copies thereof.

"This order is now before us for review on a writ of error sued out by Alexander J. Cassatt, John B. Thayer, and the ten other officers and employes of the defendant company."

It is to be observed that, though the petition was for an order against the defendant and the ten persons named, the order is against those ten persons alone, and not against the defendant.

The plaintiff, the Mitchell Coal & Coke Company, contended that this court had no power to review the order on this writ, and moved for its dismissal, on the ground that it was not a final decision within the meaning of section 6 of the judiciary act of March 3, 1891. The court, however, decided that the plaintiff in error had been subjected to the jurisdiction of the circuit court and made liable to its order in a proceeding collateral to and independent of the action at law, and as the order was a decision of all the matters involved in that proceeding, and left nothing to be done, except the ministerial act of executing it, by producing the books of the defendant company, both before and at the trial of the action, it was, in so far as it required production before the trial, a "final decision," reviewable on a writ of error. It was then decided that the plaintiffs in error were not parties, within the meaning of section 724, and that the order was therefore void for that reason. As this point, however, related to a technical defect in the procedure, that could be corrected by an application to the circuit court for a new order, directed to the defend-

ant company and not to its officers, this court thought it incumbent upon it to consider the question whether the Circuit Court has the power, under section 724, to order a party to produce its books or papers before the time of trial, and concluded, for reasons stated in the opinion of the court, that section 724 does not confer such power. In the course of its opinion, the court said:

"A construction of section 724, which limits the power of the court to an order to produce the books at the trial, leaves the party against whom the order is made in a position where he may take exceptions to the rulings of the court at the trial, requiring obedience to the order, or concerning the admissibility of the books, and thereby secure a record on which a writ of error will operate. But an order to produce before trial, if it be disobeyed, will be wholly nugatory, for the reason that the penalty prescribed by the section—the entry of judgment against the disobedient party—cannot be lawfully imposed."

It will be seen, therefore, that the plaintiff in error has misapprehended the meaning and scope of this court in the case referred to. In the case at bar, the order, which is the subject-matter of the writ of error, was made against a party to the suit, to produce at the trial thereof the books and writings mentioned therein, thus differing in the respects pointed out from the order under consideration in the Cassatt Case.

It is apparent on the face of section 724, that to a certain extent the discretion of the court is appealed to, in asking for the order to produce books and writings; certainly to the extent that the court, upon such an application, must decide that, *prima facie*, the books and writings mentioned are in the possession or power of the party against whom the order is sought to be made, that the evidence they contain is not clearly irrelevant to the issue, and that the circumstances are such as that the party might be compelled to produce the same by the ordinary rules of proceeding in chancery. The court may exercise this power, therefore, in any form adapted to promote its efficiency and effect the purpose of the act. The order in this case, of March 25, 1907, to show cause at the trial, afterwards modified by the order of April 3, 1907, by making the order to produce absolute in its terms, was an order within the terms and issued within the spirit and meaning of the act. That under the rule to show cause of March 25, 1907, the objections of the defendant to the power and jurisdiction of the court to make the order, were heard and overruled, whether prematurely or not, does not preclude the defendant from taking "exceptions to the rulings of the court at the trial, requiring obedience to the order, or concerning the admissibility of the books." Such exceptions, and the rulings thereon, can clearly be made a part of the record of the case, and subject to the operation of a writ of error sued out on its final decision.

It follows, therefore, that the order of the court below complained of, was one of those subsidiary orders, the legality and propriety of which must be determined at and during the progress of the trial; that it was interlocutory, and not final, and therefore not reviewable by this court on writ of error.

The writ of error is therefore dismissed.

(154 Fed. 475.)

FORDERER v. SCHMIDT et al.

(Circuit Court of Appeals, Ninth Circuit. May 13, 1907.)

No. 1,399.

TENDER—TENDER BY STRANGER—EFFECT OF RATIFICATION.

A tender to a part owner of a mining claim of a sum which he claimed to be due him for assessment work from a co-tenant, made by a friend of the latter for the purpose of preventing a forfeiture of his rights under the statute, although not authorized at the time, is valid and effective, where it was ratified at once when made known to the person in whose behalf it was made.¹

In Error to the District Court of the United States for the Second Division of the District of Alaska.

The plaintiff in error brought ejectment to recover from co-tenants holding adversely the possession of the undivided one-half of the "Sequoia" Beach Placer Mining Claim, situated on Ophir creek, Alaska, and damages for the unlawful withholding thereof. The answer alleged the failure of the plaintiff in error to contribute his share of the assessment work on the claim for the year 1901, and alleged that his co-tenant, the defendant in error, Schmidt, performed said work and thereafter acquired the interest of the plaintiff in error in said claim, under the provisions of section 2324 of the Revised Statutes, by publishing the notice provided for in that section. The reply alleged that there was a contractual and fiduciary relation between the plaintiff in error and Schmidt, such as to estop the latter to claim the forfeiture; and alleged further that the plaintiff in error had made advances by way of outfitting said Schmidt, and by a personal loan to him of \$100, which should be held to be ample contribution toward such assessment work; that Schmidt, during the year 1901, extracted from the claim gold dust exceeding in value \$300; that before the alleged forfeiture he had extracted other large amounts from said claim, for none of which he had accounted to the plaintiff in error, and, therefore, should not be allowed to declare a forfeiture; and that a friend of the plaintiff in error in due time tendered to Schmidt, on behalf of the plaintiff in error, the amount claimed in the notice of forfeiture, which tender was refused, and that the said tender was duly ratified by the plaintiff in error. The evidence was that on November 2, 1900, at San Francisco, Schmidt, who was the sole owner of the Sequoia mining claim, sold and conveyed to the plaintiff in error an undivided one-half interest in that claim and certain other mining claims in Alaska, for the consideration of \$4,000, of which \$2,000 was to be paid in cash and the remainder was to be expended by the plaintiff in error in the spring of 1901 in purchasing an outfit for said Schmidt, all of which was done; that when Schmidt went to Alaska in the spring of 1901 the plaintiff in error sent with him his son, and the latter with Schmidt jointly used the outfit in working upon some of the claims, but not upon the Sequoia; that in September, 1901, the son of plaintiff in error left Alaska and did not again return, and that at that time Schmidt owed the plaintiff in error \$100 for borrowed money. Schmidt testified that the son of the plaintiff in error, while he was in Alaska, acted as his father's agent, and that when he left Schmidt paid to the son the \$100 owing to the father; that at that time no arrangement had been made about the assessment work on the Sequoia claim for the year 1901; that, after the son left, Schmidt went on mining for the interest of the plaintiff in error as well as for his own, but that he had no understanding with plaintiff in error or his son in regard to representing the claim in which the former had an interest; that he, Schmidt, did all the representative work on the Sequoia for the year 1901, and took from the claim between four and five hundred dollars, a sum insufficient to cover the expenses of the work done for that year. Adolph Nieman testified that on or about October 12, 1902, while Schmidt's notice of forfeiture was being published, one George James gave the witness \$200 and told him to tender it to Schmidt, saying that Schmidt

¹ See note at end of case.

was trying to do the plaintiff in error out of the claim. He testified that he made the tender, saying to Schmidt: "There is two hundred dollars. That is the money for the man you have been advertising in the 'Council City News' for the claims for assessment work;" and that Schmidt refused the tender on the ground that it was not authorized by the plaintiff in error. This testimony was not disputed. The plaintiff in error testified that in the early part of the year 1903, and as soon as he heard of the act of his friend and agent, he ratified and confirmed it. The notice of forfeiture set forth the fact that Schmidt had expended \$200 in labor in performing assessment work for the years 1901 and 1902 upon the Sequola claim. It was admitted that publication of the notice was premature for the assessment work of 1902, but it was contended by the defendants in error that it was a sufficient notice on which to base a forfeiture for the nonpayment of the assessment work of 1901. Concerning the effect of the tender, the court instructed the jury: "That such a tender would not be valid in law unless made either by Forderer himself, or by an agent duly authorized by Forderer to make such tender. And you are further instructed that, if Schmidt made objection at the time of the tender by Nieman to the validity of the tender on the ground that it was not made by a duly authorized person in behalf of Forderer, the tender by Nieman or James would not avail Forderer in this action to continue his ownership in said claim." The jury returned a verdict for the defendants in error, and judgment was thereupon rendered.

For former opinion, see 146 Fed. 480, 77 C. C. A. 36.

G. J. Lomen and Charles E. Naylor, for plaintiff in error.

Charles Page, Edward J. McCutchen, W. S. Burnett, Gordon Hall, Albert Fink, and Thomas H. Breeze, for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and HUNT, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Error is assigned to the instructions given by the court on the subject of the tender. In 2 Parsons on Contracts (9th Ed.) 639, it is said of a tender:

"It need not be made by the defendant personally. If made by a third person at his request it is sufficient, and, if made by a stranger without his knowledge or request, it seems that a subsequent assent of the debtor would operate as a ratification and make the tender good."

The language of the text is supported by reference to *Harding v. Davies*, 2 C. & P. 78, *Read v. Goldring*, 2 M. & S. 86, and *Kinkaid v. Brunswick*, 11 Me. 188. In the case last cited the court said:

"It is a well-settled principle of law that a tender may be made as well by an authorized agent as by the debtor himself; and it is also a plain principle that a ratification of an act done without authority is equivalent to a previous authority. No authorities need be cited in support of either of these principles. Admitting that Snow was not authorized to make the tender, still his act in making it has been distinctly ratified and sanctioned by the school district in placing their defense on this tender by Snow. This is an adoption of his act as their own."

While the general doctrine is announced in several decisions that a tender by a mere stranger is not valid, and that to make it effectual it must appear that at the time when it was made the person making it had the right, as principal or agent, to tender the payment of the

debt, we find no case which holds that the act of a stranger in making the tender may not be rendered valid by subsequent timely ratification by him in whose interest it was made, and the authorities above cited hold to the contrary. While the rule above quoted may not be applicable to all cases, no reason is perceived why it should not apply to a case such as the present one, where the tender was of a simple debt, and was made for the purpose of avoiding forfeiture under a statutory proceeding instituted by one co-tenant against another co-tenant. It could make no difference to Schmidt who paid the debt. The tender did not involve the acquisition of any right, privilege, or property by the person making it, or the surrender of any property held in pledge or otherwise by the person to whom it was made. On principle the case is similar to *Bennett v. Hunter*, 9 Wall. 326, 19 L. Ed. 672, *Tracy v. Irwin*, 18 Wall. 549, 21 L. Ed. 786, and *Atwood v. Weems*, 99 U. S. 183, 25 L. Ed. 471, cases which arose under the act of August 5, 1861, to provide increased revenue on imports, etc., and the act of June 7, 1862, "for the collection of direct taxes in insurrectionary districts in the United States," in which it was enacted that the title "of, in and to each and every piece and parcel of land upon which said tax has not been paid as above provided, shall thereupon become forfeited to the United States." It was insisted that the right of payment of such a tax was limited to the actual owner. The court said:

"But to whom did the right to make this payment belong? The obvious answer is, to the owner, either acting in person or through some friend or agent, compensated or uncompensated. The terms of the act are that the owner or owners may pay; and it is familiar law that acts done by one in behalf of another are valid if ratified, either expressly or by implication, and that such ratification will be presumed in furtherance of justice."

In the light of these authorities, we are of the opinion that the tender of payment on behalf of the plaintiff in error, if ratified by him, was sufficient to relieve his interest in the mining claim from forfeiture, that the court below should have so instructed the jury, and that the instruction given was error, for which the judgment must be reversed and the cause remanded for a new trial.

NOTE.

Persons by Whom Tender may be Made.

[a] (Cal. 1867) A party having no interest in mortgaged premises, or in a tender made, has no right to make a tender on his own behalf of the amount due on the mortgage.—*Mahler v. Newbaur*, 32 Cal. 168, 91 Am. Dec. 571.

[b] (Ga. 1852) A tender, in order to be a bar, must be made by the debtor or his legal representative, and not by a stranger.—*McDougald v. Dougherty*, 11 Ga. 570.

[c] (Ky. 1879) A purchaser of land subject to a lien may make a valid tender to the lienor.—*Yeager v. Groves*, 78 Ky. 278.

[d] (Me. 1834) A tender made by an inhabitant of a school district to one having a claim against it is valid, though such inhabitant was not thereto regularly authorized by the district.—*Kincaid v. School Dist. No. 4 in Brunswick*, 11 Me. (2 Fairf.) 188.

[e] (Me. 1882) A mortgagee is not obliged to accept a tender of the amount due on the mortgage from one who holds but a moiety of the equity of redemption, and when there is a dispute as to the title of the equity, in redemption and discharge of the whole mortgage.—*Rowell v. Jewett*, 73 Me. 365.

[f] (Mich. 1883) The claimant of land under tax titles, not subject to a mortgage on the land, having by reason thereof no right of redemption, cannot make a valid tender of the amount due on such mortgage.—*Sinclair v. Learned*, 51 Mich. 335, 16 N. W. 672.

[g] (Minn. 1900) A tender of the amount of a mortgage lien by the mortgagor's assignee in insolvency has the same effect as if made by the mortgagor.—*Davies v. Dow*, 80 Minn. 223, 83 N. W. 50.

[h] (Mo. 1901) When money had been paid to a person before death, and had not been paid over by him to persons to whom it belonged, a tender of the amount to such persons, made by the executrix of the estate after the money had come into her hands as assets of the estate, is good.—*Sharp v. Garesche*, 90 Mo. App. 233.

[i] (N. Y. 1833) A proposition by a third person, negotiating for the purchase of land bound by a judgment, to discharge the judgment, provided he can obtain a perfect title, is not such a tender as to stop the interest upon the judgment.—*Jones v. Moore*, 1 Edw. Ch. 632.

[j] (N. Y. 1873) A tender cannot be made by a stranger to the contract, so as to oblige the creditor to accept it.—*Harris v. Jex*, 66 Barb. 232.

[k] (Pa. 1827) A tender of payment is good, though it be not stated whether it is made by the purchaser or as agent, where the purchaser has the right to tender and did not pretend to act in any other capacity.—*Johnston v. Gray*, 18 Serg. & R. 361, 16 Am. Dec. 577.

[l] (Pa. 1829) A tender of money for an infant, by his uncle, is good, though not appointed guardian at the time of tender.—*Brown v. Dysinger*, 1 Rawle, 408.

[m] (Tenn. 1853) A tender by one tenant in common, on behalf of all, is good on a subsequent bill to enforce the equity of redemption.—*Gentry v. Gentry*, 33 Tenn. (1 Sneed) 87, 60 Am. Dec. 137.

(156 Fed. 929.)

HARRIS & CO. v. CHIPMAN.

CHIPMAN v. HARRIS & CO.

(Circuit Court of Appeals, Eighth Circuit. October 19, 1907.)

Nos. 2,343, 2,344.

1. BANKS AND BANKING—WRONGFUL DEPOSIT BY AGENT—LIABILITY OF BANK TO PRINCIPAL.

A banker, who knowingly permitted an agent to deposit money of his principal to his own account and mingle the same with his own funds in violation of his contract, which required the deposit to be in the name of his principal, if for that reason chargeable with liability to the principal, in the absence of fraud or conspiracy, is accountable only for losses resulting directly from such wrongful deposit, such as for sums applied by the agent to his own use, and not for losses resulting from the use of the money by the agent as contemplated by the contract of agency.

2. SAME—ACCOUNTING.

In such case the banker cannot be held to account for a sum originally advanced by the principal to the agent to be used for the purposes of the agency, and so deposited by the agent to his own credit, but which was afterwards treated by the principal as a loan to the agent, and for which his note was taken, nor for a sum lent by the banker to the agent personally, and which, having been used for agency purposes, was repaid by the principal with knowledge of the facts.

3. EVIDENCE—ADMISSIONS IN PLEADING.

Where plaintiff sued defendant, a banker, for losses sustained through an agent, on the ground that defendant knowingly permitted the agent

to deposit money advanced to him by plaintiff to his own credit in violation of his contract, an allegation in the answer that plaintiff had previously sued the agent for such losses and recovered judgment for a much smaller sum than that demanded from defendant was not an admission by defendant of his liability for the amount of such judgment, to which he was not a party.

Appeals from the Circuit Court of the United States for the District of Utah.

Ralph W. Breckenridge and Charles J. Greene (Andrew L. Hoppaugh, on the brief), for plaintiff.

Waldemar Van Cott (George Sutherland and E. M. Allison, Jr., on the brief), for defendant.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. Harris & Co., incorporated, sued James Chipman to compel him to account for \$75,967 as a trustee ex maleficio, and secured a decree for \$2,368.45 and some accrued interest. Both parties appealed. Harris & Co. was engaged in the live stock business, with main offices at South Omaha, Neb. James Chipman was a banker, and lived in Utah. The controversy arose out of the operations of John F. and Richard W. Bradshaw, who were engaged in buying and selling live stock in Utah and neighboring states under the firm name of Bradshaw Bros. Harris & Co. employed the Bradshaws as agents to purchase sheep and cattle for it and with its funds, and intrusted to them from time to time upwards of \$150,000, of which \$75,967 went into Chipman's bank to the credit of "Bradshaw Bros." Harris & Co. sustained losses and sought to recover of Chipman upon three grounds: (1) That Chipman and the Bradshaws conspired to defraud Harris & Co. of its moneys, and its loss was the result of the conspiracy. (2) That before employing the Bradshaws, Harris & Co. sought of Chipman information regarding their financial responsibility, and that Chipman intentionally gave them a false standing. (3) That the contract between the Bradshaws and Harris & Co. required the former to keep the moneys advanced as the moneys of Harris & Co. and in its name in bank, and that the stock purchased should be purchased in the name of Harris & Co.; that Chipman knew this, but that nevertheless he allowed the Bradshaws to deposit the moneys received from Harris & Co. to the credit of their own account in his bank, to intermingle them with their own funds, and to check indiscriminately upon the account for their own expenditures and business operations, as well as for those in which Harris & Co. was interested. This, it is claimed, was equivalent to a conversion by Chipman of \$75,967 of the funds of Harris & Co.

It will serve no useful purpose to give in detail the evidence appearing in the voluminous record touching the first and second of the grounds enumerated. In our opinion they were wholly unsubstantiated. There is no evidence from which it can fairly be inferred that Chipman and the Bradshaws engaged in any conspiracy to defraud Harris & Co. of its money or property. An analysis of the Bradshaw Bros.' account in Chipman's bank, whereby the credit items coming from Harris & Co. are segregated from those in which it had

no interest, and whereby the disposition of them is accurately traced, disproves all claim that the bank dishonestly profited by the admixture of the funds; and, as full opportunity to so profit presented itself and was not availed of, it is highly improbable that a purpose to do so was ever entertained. Neither does the evidence justify the assertion that the recommendation given by Chipman as to the Bradshaws' responsibility was not in good faith. Their previous dealings were sufficient to justify it, and a continued extension of credit by Chipman to the Bradshaws personally is persuasive evidence of his sincerity. That the Bradshaws were indebted to Chipman at the time is without material significance, in view of the fact that there was stock on hand, undisposed of, representing unclosed transactions between them.

The third ground upon which recovery is sought requires a more extended statement of our conclusions. As already observed, \$75,967 belonging to Harris & Co., instead of being kept separately in its name, went to the credit of Bradshaw Bros. and became mixed with funds of that firm in Chipman's bank. The trial court in reaching its decree charged Chipman with that entire amount and credited him with the sums actually drawn out and used by the Bradshaws in paying for sheep and cattle purchased for Harris & Co., and also with two other items debited to the account before Chipman learned of the contract restriction upon the keeping of the funds. The accounting on this basis resulted in the balance of \$2,368.45 specified in the decree. The decree proceeded upon the theory that Chipman became a participant in a misapplication of the funds from the time he became aware of the contract. We may here observe that the court credited Chipman with no disbursement on account of sheep or cattle purchases which the evidence did not show was made. Harris & Co. now contend that Chipman should not be credited with sums withdrawn and actually applied to purchases on its account, but only with the net results of each particular transaction. In other words, they say in substance that, if any resale by Harris & Co. of stock purchased resulted in a loss to it, that loss should have been charged to Chipman. Of course, this contention is inadmissible in view of what we have said concerning the freedom of Chipman from the imputation of fraud and conspiracy. If the fact were that all of the money intrusted to the Bradshaws under the contract had been actually used for the purposes of the contract, the mere deposit to the wrong account would have resulted in no damage. If the moneys were checked out of the bank and used for a proper purpose, Chipman could not be held responsible for errors of business judgment of Harris & Co. or its agents, nor for losses sustained by subsequent improper conduct of the latter. Such losses have no proximate connection with the keeping of the funds in the wrong account. Also, if part of the moneys went out of the bank to the personal use of the Bradshaws, the recovery could not be for more than the amount so misapplied.

Assuming that the theory adopted by the trial court was right, generally speaking, there were three items charged to Chipman which in our opinion should have been eliminated from the accounting. For some time prior to June 26, 1899, Harris & Co. and the Bradshaws

had extensive transactions in cattle, some of which were cleared through Chipman's bank. On the day mentioned the contract was entered into whereby the character of their relations was changed, and the Bradshaws agreed to act as agents and to handle the moneys advanced them as the moneys of their employer. The Bradshaws and Chipman had also had extensive dealings in sheep and cattle, and the former maintained a personal account in the bank of the latter. On July 6, 1899, Bradshaw Bros. drew a draft upon Harris & Co. for \$5,000, deposited it with Chipman, and received credit for the amount in their personal account. On July 10th a similar transaction occurred. These drafts were for the first moneys advanced by Harris & Co. under the contract; but when Chipman credited them to the Bradshaw Bros. account he was not aware of the limitation imposed upon their authority. Counsel for Chipman say in this state of affairs that he had no power to compel the Bradshaws to open a new account in the name of Harris & Co. and to transfer the items in question to its credit, that the relation of banker and customer gave him no authority to do so without their assent, that under the circumstances it was not his duty to exercise a supervisory control over their disposition of the funds in their personal account, and, had he attempted to do so, they had the right to close their account and transfer their business elsewhere (Mr. Justice White in *Randolph v. Allen*, 19 C. C. A. 353, 73 Fed. 23). We need not consider whether the doctrine of the case cited applies to the facts before us, for we are clearly of the opinion that the character of the transaction, so far as it relates to the two drafts, was subsequently changed by mutual agreement from that of an advancement under the contract to that of a time loan. Some differences which arose between the parties to the contract as to the right construction of it were adjusted at Omaha, Neb., between the 21st and 25th of July, 1899. Prior to July 22d, the Bradshaws stood charged upon the books of Harris & Co. with the two \$5,000 drafts. On that day they gave Harris & Co. a 90-day note for \$10,000, bearing 10 per cent. interest and dated July 8th, which was the average of the dates of the two drafts. It was credited to the Bradshaws, and in effect eliminated the drafts from the account. On August 10, 1899, Harris & Co. rendered to the Bradshaws a statement of their dealings to that date. It showed the note to the credit of the Bradshaws, and also that there was a balance of \$766.29 due them. A few days later Harris & Co. paid this balance, though the note unmatured was still outstanding. Under these circumstances the moneys represented by the two drafts should not have been treated at the accounting as the moneys of Harris & Co. wrongfully converted by the Bradshaws with Chipman's participation.

As to the other item: About the middle of July, 1899, J. F. Bradshaw was in Idaho buying sheep for Harris & Co. He had made some purchases, and in doing so had checked on the firm account with Chipman for about \$7,000. He was about to make another purchase, which called for nearly \$20,000. Some telegraphic correspondence then ensued between Bradshaw and Harris & Co. The latter demanded that the bill of lading of the sheep should be attached to the draft for the purchase price. Bradshaw contended this was not ac-

according to the contract. The seller of the sheep refused to take such a draft. Thereupon Bradshaw, after advising Harris & Co. that he would have to procure the money elsewhere, wired to Chipman and procured a credit of \$20,000 and completed the purchase. The sheep came to \$18,275.70. They were shipped by the Bradshaws as their own sheep to Nebraska, where they were taken off of their hands by Harris & Co., who authorized a draft upon them for \$20,000 to repay Chipman. The claim that this draft should be charged to Chipman in the accounting between him and Harris & Co. as for moneys misappropriated is foreclosed by the admission of the president of the latter that it was to repay Chipman and that he did not think that the proceeds of it went to the credit of any account of Harris & Co. in Chipman's bank.

It was claimed by the Bradshaws that the provision of the contract that the moneys furnished by Harris & Co. should be kept in an account in its name had been abrogated. Chipman was so informed by one of the Bradshaws, and we think he was warranted in believing so in view of a letter of date July 25, 1899, sent by Harris & Co. to Chipman's bank, the fact that it was arranged that thereafter an agent of Harris & Co. should accompany the Bradshaws and be present at the receiving and payment for stock purchased, and the further fact that at no time thereafter, as long as the relations between the Bradshaws and Harris & Co. continued, did the latter ever ask for or receive from Chipman a statement of any account in his bank in which its moneys were deposited. There is the further fact that Harris & Co. knew that about half of the moneys advanced to the Bradshaws did not go through Chipman's bank. These considerations apply to those items placed to the credit of Bradshaw Bros.' account after the date of the letter above referred to. But if the two drafts for \$5,000 each and the one for \$20,000, with the corresponding disbursements from the proceeds, are eliminated from the accounting, as we think they should be, nothing would be left for recovery.

Before answering, Chipman interposed a plea in bar, wherein he claimed that Harris & Co., being a Nebraska corporation, was not authorized to do business in Utah, because it had not complied with the laws of the latter state. Issue was taken, and upon a trial the plea was falsified. It is now contended by counsel that the trial court should not have allowed Chipman to answer, but should at once have entered a decree for Harris & Co. As to this we need say no more than that the action of the trial court was not challenged in the assignment of errors, as required by the rules.

In answer to the charge in the bill that Harris & Co. had lost \$75,000 by the Bradshaws' acts and Chipman's participation, the latter averred that Harris & Co. had previously sued the Bradshaws for what they owed it, and had recovered judgment for \$25,446.64, and, further, that no other sum was due from the Bradshaws, and that the judgment was for the same moneys that Chipman was then being sued for. Counsel claim that this was an admission of an indebtedness, conclusive upon Chipman, and that Harris & Co. were entitled to a decree accordingly. But Chipman was not a party to that action, and was not bound by the judgment. The averments in the answer were

by way of evidence that Harris & Co. was consciously overstating its claim. Moreover, if it were true that the losses of that company were of moneys that went through Chipman's bank, it would not follow that Chipman was responsible for them. Under the contract the Bradshaws guaranteed the financial success of the ventures in which the moneys of Harris & Co. were invested; but, as we have seen, the liability of Chipman stands upon a narrower ground. The Bradshaws' liability for the outcome of the moneys that went through the bank of Chipman and the latter's right conduct and good faith are not inconsistent.

The decree of the Circuit Court is reversed, with direction to enter a decree dismissing the bill upon the merits.

(156 Fed. 934.)

In re WILLIAMS' ESTATE.

ANHEUSER-BUSCH BREWING ASS'N v. HARRISON (two cases).

(Circuit Court of Appeals, Ninth Circuit. November 4, 1907.)

No. 1,339.

1. BANKRUPTCY—APPELLATE JURISDICTION—MODE OF REVIEW.

Where an appeal taken in a bankruptcy proceeding under Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], involves only a question of law, it may be treated by the appellate court as a petition to revise.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 929.

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

2. SAME—LIENS—ENFORCEMENT IN BANKRUPTCY COURT—COSTS CHARGEABLE TO PROCEEDS.

The proceeds of property of a bankrupt, covered by valid liens and sold by the court of bankruptcy by request or consent of the lien holders, who subsequently filed their claims in such court, which were allowed as secured claims in an amount in excess of such proceeds, are properly chargeable with the costs of such court appropriate to the enforcement of the liens, but not with general costs of the administration of the estate, such as the general fees of the trustee and his attorney, or for the services of a receiver in carrying on the business of the bankrupt and his attorney, or for the expenses and losses of such business.

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington.

Petition for Revision of Proceedings of the District Court of the United States for the Northern Division of the Western District of Washington, in Bankruptcy.

Willett & Willett, W. H. Chickering, Warren Gregory, and Allen L. Chickering, for petitioner and appellant.

John H. Allen, for respondent and appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The question involved in these proceedings is one of law and arises upon the record. The appellant and petitioner, being uncertain in respect to the proper procedure, sought and was by the court below allowed an appeal from the ruling of that court complained of, and also filed therein a petition for the revision

of the same order. The two proceedings were by this court consolidated, and were heard and submitted on one record. If it be conceded that the petition for revision was filed in the wrong court, the appeal, involving as it does only a question of law, may be treated as a petition for revision. *In re Abraham*, 93 Fed. 767, 783, 784, 35 C. C. A. 592; *In re Blair*, 106 Fed. 662, 665, 45 C. C. A. 530; *In re Jacobs*, 99 Fed. 539, 39 C. C. A. 647.

In brief, these, among other, facts, are made to appear by the original and supplemental records filed herein: On the 16th day of September, 1905, Williams, who was at the time conducting a saloon and café in the city of Seattle, was adjudged a bankrupt. The matter was duly referred to one of the referees in bankruptcy, and one Murray was appointed receiver of the bankrupt's estate. The receiver qualified as such and proceeded to carry on the business in much the same way that the bankrupt did—at a loss. On the 11th of October, 1905, the Anheuser-Busch Brewing Association and Pacific & Puget Sound Bottling Works, corporations, presented to the referee a petition setting forth various loans made by the association to Williams, secured by certain chattel mortgages executed by him upon the contents of his saloon and café, and by the assignment of the leases of the premises and insurance policies thereon, and also by the bottling company, under certain agreements with Williams, all of which were specifically set forth in the petition, together with the alleged failure of the trustee in bankruptcy to pay certain installments of the rent due, and the alleged payment by the brewing association of the premium upon the insurance and its payment of the rent in order to protect the premises, and setting forth the maturity of the respective loans so secured by the mortgages, assignments, and other agreements set forth in the petition, and alleging that all of the assets of the bankrupt's estate, except such as were held by other preferred creditors, were contained in the saloon and café in the city of Seattle known as "The Pike," which place had been running and doing a good business up to the time of Williams' adjudication in bankruptcy; that it had acquired a valuable good will, which was becoming less every day the place remained closed; that it was impracticable to conduct the place under the trustee in bankruptcy, for the reason that the stock that would have to be sold by him was covered by the chattel mortgages, and that the place could not be made to pay under a trustee in any event; that a purchaser could be had at the time, if the place could be sold immediately, who would pay what the place was reasonably worth, and more than it would bring if such sale were postponed; that arrangements could probably be made between the petitioners and any purchaser who might take the place at the time that would make it possible for the purchaser to pay something for the equity of the estate over and above all claims of the petitioners; that the general creditors had little or no interest in the estate, and could get nothing on their amounts if a sale should be postponed; that the property was depreciating in value, and would continue to depreciate so long as it remained unsold; that the assets were uninsured, and there was imminent danger of total loss; that it would be necessary, if the sale should be postponed, to have the property insured and extra expense

incurred therefor; that the trustee had no funds with which to pay the rent of said premises, and the owners thereof were threatening to declare a forfeiture of the leases; that an emergency existed such as would justify the court in ordering an immediate sale of "The Pike," together with the stock therein and its license, without the usual notice to creditors; that the petitioners were entitled to have their securities foreclosed and the proceeds applied to the payment of their preferred claims, as set forth in the petition, and insisted on the same being done. The petitioners therefore prayed an order of the District Court directing the trustee to sell all of the assets of the estate covered by the alleged securities at public or private sale, as the court might deem best; that such sale be made absolute and free from any and all liens or incumbrances; that the court declare that an emergency existed and order the trustee to make such sale forthwith; that the proceeds thereof be paid into court to be applied to the preferred liens of the petitioners as set forth in the petition; that they be declared joint creditors as to one-half of the \$3,000 loan set forth in the petition, which was not secured to either of them; that the trustee be required to keep the place known as "The Pike" and all assets therein covered by insurance, and in a sum equal to its value, pending the sale, and that the rights of the petitioners therein be properly protected; that a proper order be made concerning the payment of the rent of the premises; that no property covered by the mortgages set out in the petition be removed by the trustee from "The Pike" pending the sale, and that attorney's fees, as provided for in the notes and mortgages set out by the petitioners, be allowed.

On the 17th day of October, 1905, the trustee of the bankrupt estate also petitioned the court for a sale of all of the property of the bankrupt at private sale, subject to the amount due upon the debt secured by the \$5,000 mortgage held by the brewing association and free and clear of any lien or claim of the \$4,000 mortgage held by that association. The petition of the trustee stated that he had filed in court an inventory of all of the property of the bankrupt, except the two leases held by him of a portion of the Eitel Building, and that those leasehold interests and the personal property mentioned in the inventory constituted all of the property of the bankrupt, or in which he had any interest, that had come to the knowledge of the trustee. The petition of the trustee also contained the following:

"That the bankrupt was in the saloon business; that he had a place on First avenue, which he had disposed of just prior to the filing of the petition in bankruptcy herein; that his other place was on Pike street, in the Eitel Building, and was known as 'The Pike'; that upon disposing of the First Avenue place the bankrupt retained therefrom a large amount of stock and property, and the same has at all times been kept separate and apart from the property at 'The Pike'; that some of the creditors hold claims solely for goods sold at First avenue and others hold claims solely for goods sold at 'The Pike.' Therefore your trustee thought it for the best interests of all parties concerned to keep said property separate, and has inventoried the same separately as appears from said inventory. That upon the property at 'The Pike' and upon the leasehold interests there appears to be two mortgages, both held by the Anheuser-Busch Brewing Association, one being to secure a supposed claim of five thousand dollars (\$5,000.00), and the other for a supposed claim of four thousand dollars (\$4,000.00); that so far as your trustee has been

able to ascertain thus far the \$5,000 mortgage is a valid and subsisting lien for such amount as may be due upon the debt secured thereby, but your trustee is informed and believes that there is some question as to the validity of the lien of the \$4,000 mortgage, and creditors holding claims aggregating large amounts have requested your trustee to contest the lien and validity of the \$4,000 mortgage."

The petitions for the sale came on for hearing before the District Court on the 17th day of October, 1905, and resulted in the making of an order for such sale in accordance with the agreement of the respective parties, which agreement is recited in the order of the court as follows:

"It was agreed by all parties concerned that the interests of the bankrupt's estate and of all of his creditors would be best subserved and protected if an immediate sale of all the property of the said bankrupt now in possession and under the control of the trustee be had, and it appearing that the costs and expenses of keeping said property are great and are accumulating rapidly, and that unless an immediate sale of all of the property be had the property will be greatly reduced by reason of such expense and there being no objection made to an immediate sale thereof, all parties consenting thereto; and it further appearing to the court that it will be for the best interests of the bankrupt, of his estate, and of all of his creditors, and of all parties concerned if said sale be made at private sale on sealed bids, and if (that) the said property and all thereof be sold free and clear of any supposed claim of mortgage or mortgages held by the Anheuser-Busch Brewing Association or by the Puget Sound Bottling Works, or by both or either of them, and the said Anheuser-Busch Brewing Association and the said Puget Sound Bottling Works and all parties present consenting that such be done, and further consenting that in making said sale the property inventoried as being the property at the First Avenue place be sold separate and apart, and the proceeds derived therefrom be kept separate and apart from that obtained from the sale of the leasehold interests and the property inventoried as being 'The Pike' stock."

The order of sale concluded with this paragraph:

"It is hereby further ordered that the proceeds of said sale shall be held by the court subject to the same preferences, liens, and mortgages as now exist against the property aforesaid."

On the 30th day of October, 1905, the property was sold, according to the certificate of the referee, "for about \$10,000." The certificate of the referee further states that the—

"amount of alleged claims of said Anheuser-Busch Brewing Association filed herein, ten thousand four hundred and twenty-five dollars (\$10,425); amount of secured claims of the said Anheuser-Busch Brewing Association, which now stand as allowed and uncontested, eleven hundred and twenty-five dollars (\$1,125); that as to the remainder of said alleged claims a contest is pending which has not been heard; that it is claimed on the part of said Anheuser-Busch Brewing Association that their lien attached to all of the property which has been sold, as above stated; that a meeting of creditors was regularly called for the purpose of passing upon the accounts of the receiver and trustee and the adjustment of expenses of administration, and continued from time to time until the date of the order sought to be reviewed, on which date and at the meeting so adjourned the said order was made and the items allowed as shown by the minutes of the meeting or order sought to be reviewed and authorized to be paid out of the funds in the hands of the trustee derived from the sale above set forth."

At one of those meetings, held January 9, 1906, the following proceedings were had:

"The report and account of receiver was approved and allowed, and the unpaid expenses of administration incurred by the receiver directed to be paid as follows:

Seattle-Tacoma Power Co., light and steam heat.....	\$ 30 04
Haswell & Co., one ton coal.....	6 25
Pacific & P. S. Bottling Co., soda water and beer.....	44 25
T. H. Wagner, band.....	133 58
J. N. Damon, services.....	10 00
J. Garrick, services.....	3 00
	<hr/>
	\$227 12

"Upon consideration of the matter of fees of the receiver and his attorneys, the trustee was ordered, directed, and empowered to pay same as follows:

Wm. H. Murray, services as receiver.....	\$ 70 00
McClure & McClure, attorneys for receiver.....	100 00
	<hr/>
	\$170 00

"The Pacific & Puget Sound Bottling Company and the Anheuser-Busch Brewing Association, by their said attorneys, excepted to same allowances, and all and every part thereof, and the exception was allowed by the court."

At another of the meetings, held March 2, 1906, the following proceedings were had:

"At a meeting of the creditors regularly called for the purpose of making allowances in said estate on account of fees of the attorneys and the trustee and paying the expenses of the said trusteeship, regularly adjourned to this date, it is now here ordered that the said trustee, A. H. Harrison, pay as follows, to wit:

The garbage man.....	\$ 2 00
Appraisers for the liquors.....	10 00
Appraisers for the other goods.....	10 00
Times Printing Co., printing notice of sale.....	6 00
Post-Intelligencer, printing notice of sale.....	3 30
The Star, printing notice of sale.....	3 00
Watchman for said goods.....	60 00

"That he pay his attorneys, Allen, Allen & Stratton, the sum of three hundred (\$300.00) dollars as temporary allowance on account of their fees herein, and himself as a temporary allowance as trustee herein the sum of two hundred and one (\$201.00) dollars. To all of which said orders, and to each thereof, the Anheuser-Busch Brewing Association, by its attorneys, Willett & Willett, excepts. Exception noted."

By the supplemental record filed herein on the 21st day of October, 1907, it appears that the receiver subsequently allowed all of the secured claims as made by the brewing association and that his action in that regard was by the court below approved on the 23d day of August, 1907, those secured claims being specified in the order of the court below as follows:

"One claim for \$4,100 and interest, one claim for \$4,000 and interest, one claim for \$1,500 and interest, and one claim for \$825 and interest, be and the same hereby are allowed as secured claims, as alleged in the proofs of said claims on file. One unsecured claim of said claimant for \$3,000, having been heretofore allowed by the receiver and not included in the petition for review, is not affected by this order."

It thus appears that all of the property of the bankrupt was covered by the brewing association's liens, and that the total amount realized from the sale of the property upon which the petitioner had valid liens was less than the amount of those liens. The real question for

decision, therefore, is to what extent, if at all, funds realized by the sale of property upon which a creditor of a bankrupt has valid liens, proof of which secured claims is filed in the bankruptcy court after the making of such sale, and when the proceeds of the sale are insufficient to pay the liens in full, may be used to pay the general costs of administration of the bankrupt's estate.

It is true that the record in the case shows that the lienholder voluntarily came into the bankruptcy court and asked that the property covered by its liens be sold by that court. The bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), in terms declares that none of its provisions shall affect a valid lien. But the estate of a bankrupt is interested in any excess that may exist over and above the amount of such liens. So it was held by this court in the case entitled *In re Jersey Island Packing Co.*, 138 Fed. 625, 627, 71 C. C. A. 75, 2 L. R. A. (N. S.) 560, that "property on which there is a mortgage or other lien passes to the trustee in bankruptcy, and is therefore in the custody of the court of bankruptcy," and, further, in the same case, that "the provision of the bankruptcy act that such a lien shall not be affected by the bankruptcy proceedings has reference only to the validity of the lienholder's contract. It does not have reference to his remedy to enforce his rights. The remedy may be altered without impairing the obligation of his contract, so long as an equally efficient and adequate remedy is substituted."

By coming into the bankruptcy court, therefore, the holder of a valid lien upon the estate of a bankrupt comes into an appropriate place and into a court amply able to enforce and protect his rights. By doing so the lienholder waives none of his rights. The enforcement of his lien in another court would entail upon the proceeds of the property upon which the lien exists the payment of the appropriate court costs; and so, in the enforcement of such lien in a court of bankruptcy, the proceeds of the property of the bankrupt upon which such lien exists is properly chargeable with the costs of such court appropriate to such enforcement, but with no other or further costs. They are not chargeable with the general costs of the administration of the bankrupt's estate, such as the services of a receiver in carrying on the business of the bankrupt, the expenses and losses of such business, the fees of the attorney for such receiver, the general fees of the trustee or those of his attorney. If so, the valid lien upon the estate of the bankrupt, which the bankruptcy act expressly declares shall be unaffected by any of its provisions, might very readily be destroyed, as it would unquestionably be, should such costs equal or exceed the proceeds in cases like the present, where the aggregate amount of the valid liens exceeds the proceeds of the entire estate of the bankrupt. In line with this ruling are the cases of *Stewart v. Platé*, 101 U. S. 731, 739, 25 L. Ed. 816; *In re Utt*, 105 Fed. 754, 45 C. C. A. 32; *In re Prince & Walter* (D. C.) 131 Fed. 546, 552; *In re Bourlier Cornice & Roofing Co.* (D. C.) 133 Fed. 958, 963; *Loveland on Bankruptcy* (3d Ed.) p. 775. See, also, *Collier on Bankruptcy* (6th Ed.) p. 497.

The cause is remanded to the court below, with directions to modify the order in accordance with the views above expressed.

(156 Fed. 940.)

**UNITED STATES v. SCRUGGS, VANDERVOORT & BARNEY DRY
GOODS CO.**

(Circuit Court of Appeals, Eighth Circuit. November 6, 1907.)

No. 2,521 (1,793).

1. CUSTOMS DUTIES—CLASSIFICATION—SILK AND WOOL GOODS.

In Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 391, 30 Stat. 187 [U. S. Comp. St. 1901, p. 1670], the proviso that "all manufacturers, of which wool is a component material, shall be classified and assessed for duty as manufactures of wool," is not limited to the goods containing silk which are the subject of said paragraph, but extends to all silk and wool goods; and dress goods in chief value of silk, but in part of wool, become by virtue of this proviso subject to the duty on wool goods, rather than that on silks.

2. STATUTES—PROVISO—EXTENT OF SCOPE.

The scope of a proviso is to be determined by its words and import, rather than by its connection with subdivision of the statute; and a proviso contained in a paragraph of a tariff act may be construed to relate to other provisions also.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

For decision below, see 147 Fed. 888, in which the Circuit Court affirmed a decision of the Board of United States General Appraisers, which had reversed the assessment of duty by the surveyor of customs at the port of St. Louis.

Edward P. Johnson (Henry W. Blodgett, on the brief), for appellant.

Everit Brown (Ralph Pierson, on the brief), for appellee.

Before VAN DEVANTER and ADAMS, Circuit Judges, and RINER, District Judge.

ADAMS, Circuit Judge. This case involves the correct classification for duty under Tariff Act July 24, 1897, c. 11, § 1, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626], of certain imported merchandise consisting of woven fabrics in the piece; the same being women's and children's dress goods composed of silk and wool. The question is whether the merchandise comes within the purview of paragraph 369 of "Schedule K, Wool and Manufactures of Wool," or paragraph 387 of "Schedule L, Silks and Silk Goods." The collector of customs at St. Louis classified it under the wool schedule. The Board of General Appraisers, on protest filed and due procedure taken by the importers, disapproved of that classification, and held that the goods should be classified under paragraph 387 of the silk schedule. An appeal was taken to the court below from the decision of the Board of General Appraisers. It affirmed the decision of the Board, and ordered the collector to reliquidate the entry accordingly. From that decision an appeal was prosecuted to this court.

Paragraph 369 imposes upon women's and children's dress goods and other goods composed wholly or in part of wool a certain duty. Paragraph 387 imposes upon woven fabrics in the piece of certain

designated weight and containing more than 30 per cent. in weight of silk a certain duty less in the aggregate than that provided for in paragraph 369. The important and distinguishing feature of the goods embraced in the two paragraphs is that those embraced in paragraph 369 must be composed in part at least of wool, while those embraced in paragraph 387 must be composed in part at least of silk. The weight and other specific features of the goods described in the two are unimportant for our present purpose. Paragraph 369 is more general in its description, and undoubtedly covers the merchandise in question. Paragraph 387 is more specific in description, but not so much so as to exclude the merchandise in question. In other words, the importation comes well within the narrow and more specific description of that paragraph. A large part of the argument before us was on the contention that because of the limitation which narrowed the classification in paragraph 387, and because the importation in question falls within that narrow description, it should, under the authority of *Hartranft v. Meyer*, 135 U. S. 237, 10 Sup. Ct. 751, 34 L. Ed. 110, and other cases cited, be classified for duty under that paragraph. But in the view we take of other provisions of the act our conclusion is not at all dependent upon that consideration.

The silk schedule is embraced within paragraphs 384 to 391, both inclusive, of the act. 30 Stat. 185 et seq. It includes both unmanufactured and manufactured silk; silk in the process of conversion, from raw silk to singles, trams, organize, sewing silk, twist, floss and silk threads or yarns of every kind, and silk in manufactured fabrics of different weights and proportions. Whatever other materials may be in the manufactures, silk must be a component part of each; and in many instances it is the component material of chief value. Paragraph 391, which closes the schedule so far as the enumeration of articles subject to duty is concerned, is in the following words:

"All manufactures of silk, or of which silk is the component material of chief value, including such as have India rubber as a component material, not specially provided for in this act, and all Jacquard figured goods in the piece, made on looms, of which silk is the component material of chief value, dyed in the yarn, and containing two or more colors in the filling, fifty per centum ad valorem: Provided, that all manufactures, of which wool is a component material shall be classified and assessed for duty as manufactures of wool."

The government contends that the proviso just quoted is determinative of this case; that its clear intent and purpose is to relegate every manufacture of silk of which wool forms a component material of any value at once to the wool schedule, and to make it subject to a duty under the appropriate paragraph of that schedule. The importer, on the other hand, contends that the proviso in question is limited in its operation to section 391. Which of these contentions is correct? The answer to this question depends upon the legislative intent, as manifested by the whole act. The proviso in question in the language employed is broad enough to fairly cover the imported articles in question, of which silk and wool are component materials; and Congress is presumed to intend what the language employed fairly imports. *Brun v. Mann*, 151 Fed. 145, 147, 80 C. C. A. 513.

But it is contended that it relates only to those manufactures refer-

red to in the paragraph (391) of which it is a part, and has no relation to manufactures which afford the subject-matter of some of the other immediately preceding paragraphs of the silk schedule, such as the woven fabrics in the piece, the handkerchiefs or mufflers, etc., found in 387 and 388, respectively. We cannot agree to this contention. The proviso is found at the end of the silk schedule, after an enumeration of many manufactured articles composed in whole or in part of silk, including woven fabrics in the piece. Congress was dealing with manufactures of silk generally. Its mind was dwelling on that subject, and we have no doubt that the word "manufactures," employed in the proviso, refers to any and all manufactures of silk specified in the schedule then under consideration. The contention that, if the proviso is given operation beyond the confines of the particular paragraph in which it appears, it cannot be stopped by the limits of the silk schedule, but must operate throughout the entire act on all the schedules, and would create interminable confusion, is not sound or persuasive. See cases *infra*. It fails to regard the subject on which the legislative mind was dwelling. General language is often employed in treating of a given subject, and in its interpretation is necessarily and rationally limited to that subject.

But it is said that there is a well-settled rule that a proviso is to be construed with reference to the immediately preceding parts of the clause to which it is attached, and limits only the passage to which it is appended. We do not think there is any mechanical limitation of that kind. Endlich, in his work on the Interpretation of Statutes, invoked by counsel for the importer as his authority, in section 185 lays down the rule that a reasonable operation must be given to the proviso consistent with the principal object of the act; and in section 186 he says:

"The question whether a proviso * * * restrains or operates upon the immediately preceding provisions only of the statute, or whether it must be taken to extend in whole or in part to all the preceding matters contained in the statute, must depend * * * upon its words and import, and not upon the division into sections that may be made for convenience of reference in the printed copies of the statute."

In *United States v. Babbitt*, 1 Black, 55, 61, 17 L. Ed. 94, the Supreme Court had under consideration a proviso to an act. It was confronted with the same argument as was made before us. It was answered thus:

"We are of the opinion that the proviso referred to is not limited in its effect to the section where it is found, but that it was affirmed by Congress as an independent proposition, and applies alike to all officers in this class."

The conclusion that the proviso was intended to operate upon the whole silk schedule is in harmony with and in execution of the general legislative intent disclosed in the wool schedule, namely, that all imported articles containing any part of wool should be taxed in a certain way. To avoid the possibility of silk articles containing some part of wool being taxed under the silk schedule, instead of under the general wool schedule, the proviso, in our opinion, was enacted. District (and later Circuit) Judge Coxe, in *Arnold v. United States*

(C. C.) 113 Fed. 1004, had under consideration a similar proviso in the silk schedule of the customs act of 1890 (26 Stat. 567), and reached the conclusion which we now reach. The cases of *United States v. Slazenger* (C. C.) 113 Fed. 524, and *United States v. Walsh* (C. C. A.) 154 Fed. 770,¹ recently decided, which are relied on by the importer's counsel, are, in our opinion, not in conflict with the conclusion we have reached, but rather in full harmony with it. District (and later Circuit) Judge Townsend in the first-mentioned case had under consideration the proper classification of tennis balls made of wool and rubber, of which silk did not constitute a component material. He held that the proviso in question did not extend to such a manufacture. The question there in judgment was whether the proviso was so independent of all the provisions of the silk schedule as to apply to any and all manufactures of which wool was a component material whether they contain silk or not. He held it was not. The Walsh Case raised the same question. Putnam, Circuit Judge, in delivering the opinion of the Circuit Court of Appeals said:

"This case turns on the construction of the proviso which concludes paragraph 391 of the customs act of 1897. * * * The United States maintained that this paragraph is to be construed to cover all manufactures of which wool is a component material to the same extent as though the paragraph was a separate section of the act in question, and disconnected from the position which it occupies in 'Schedule L, Silks and Silk Goods.' * * * A full statement of the circumstances is found in the opinion of the learned judge of the Circuit Court, to which we refer for any additional information required, and in which we concur."

The imported merchandise there in judgment was classified under "Schedule J, Flax, Hemp, Jute and Manufactures of." It contained no silk, and, of course, had no place in "Schedule L, Silks and Silk Goods," and the Circuit Court of Appeals held that the proviso was not such an independent section as to cover any manufactures whether containing silk or not, but that it must be read as a proviso to the silk schedule only. Judge Lowell, who presided at the trial in the Circuit Court, held that the proviso relates only to goods composed of wool and silk, and does not require that fabrics in chief value of flax should be removed from their appropriate schedule, and, because of the proviso, be made dutiable under the wool schedule, merely because they were composed in part of wool. He said:

"Whatever interpretation be given to the proviso of paragraph 391, I cannot think that it was intended to control the language of all the other paragraphs of the tariff act, and to make many of them nugatory, as is contended by the government. Probably the proviso will be construed best in accordance with the intention of Congress if it be limited to fabrics part of silk and part of wool. T. D. 27,921."

Judge Putnam, after expressing his concurrence in Judge Lowell's opinion, said:

"In view of the sweeping results explained by the learned judge of the Circuit Court which would follow from not applying the general rule to the present case, we must hold that it does apply, and that the words 'all manufactures,' found in the proviso, should be held to be only a repetition of the same words with which the paragraph begins, and as having absolute relation thereto."

¹ 83 C. C. A. 472.

These opinions, instead of making against the contention of the government in this case, make strongly for it. We fully agree with them. The words "all manufactures," in the proviso, mean all manufactures of silk embraced within the silk schedule of which wool is a component material.

The Circuit Court erred in affirming the decision of the Board of General Appraisers. It should have classified the merchandise in question as "manufactures of wool," as was done by the collector of customs.

The decree of the Circuit Court is reversed, and the cause remanded, with directions to proceed in accordance with this opinion.

(156 Fed. 944.)

ALPENA PORTLAND CEMENT CO. v. BACKUS.

(Circuit Court of Appeals, Eighth Circuit. November 8, 1907.)

No. 2,515.

1. SALES—CONSTRUCTION OF CONTRACT FOR FUTURE DELIVERY—RIGHT OF RESCISSION FOR BREACH.

Defendant sold and agreed to deliver to plaintiff 100,000 barrels of cement, and plaintiff to receive and pay for the same. One-half was to be delivered the first year, and the remainder the following year, at either one of two ports on Lake Superior, at plaintiff's option. The contract contained the following provision: "Shipments to be made [by defendant] after navigation opens and continue throughout the season in 5,000 to 10,000 barrel lots as required by said second party [plaintiff]; shipments to be made on or before October 15th of each year. Said second party shall give 30 days' notice of shipments to be made, in advance." *Held*, that such provision contemplated shipments by water in 5,000 to 10,000 barrel lots throughout the season; that the provision for notice was for the benefit of both parties, and required plaintiff to give 30 days' notice in advance of each of such shipments, especially in view of another provision for tests of the cement requiring 28 days' time, and the taking of samples for such tests at the factory "approximately on the date that notice of shipment is given"; that the failure of plaintiff to order and give such notices covering the quantity deliverable the first season at least 30 days before October 15th was equivalent to a failure to take and receive, and justified defendant in rescinding the contract.

2. SAME—WAIVER OF BREACH.

Defendant was not estopped to rescind because of letters, written after plaintiff's default, expressing a desire for performance during the following season, where plaintiff did not accede, but insisted on immediate further shipments without the notice to which defendant was entitled.

In Error to the Circuit Court of the United States for the District of Minnesota.

Joseph H. Cobb (James D. Shearer and Martin Monaghan, on the brief), for plaintiff in error.

C. J. Rockwood (Harris Richardson and Harold C. Kerr, on the brief), for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and PHILIPS, District Judge.

HOOK, Circuit Judge. Backus sued the cement company to recover damages for breach of contract in failing to deliver cement it

had sold him. He recovered judgment. The case turned upon the construction of the writing which fixed the relations of the parties, and the company claims that the trial court erred in that particular. By a written contract made in January, 1905, the company which was engaged in manufacturing cement at Alpena, Mich., sold and agreed to deliver 100,000 barrels of its product, and Backus purchased and agreed to receive and pay for the same. It was provided that one-half of the number of barrels of cement should be delivered in 1905, and the other half in 1906, and that the deliveries should be made at either Duluth, Minn., or Port Arthur, Ontario, at the option of Backus. The contract contained this provision:

"Shipments to be made [by the company] after navigation opens and continue throughout the season in 5,000 to 10,000 barrel lots as required by said second party [Backus]; shipments to be made on or before October 15th of each year. Said second party shall give 30 days' notice of shipments to be made, in advance."

In the latter part of July, 1905, 5,000 barrels were ordered and duly delivered; and at the request of Backus and with consent of the company the delivery of 25,000 barrels was postponed from 1905 to the season of 1906. This left 20,000 barrels to be delivered in 1905 and 75,000 barrels in the following year. In June and July, 1905, the company wrote Backus for orders for shipment of partial lots, assuming the contract was to be filled in installments, and stating that it was hampered as to storage capacity and was being pressed by boats in which transportation had been engaged. Backus, without denying the correctness of the assumption, gave reasons connected with his business for failing to give the orders. Backus gave no orders for shipment, excepting as mentioned, until September 26, 1905, when he ordered 5,000 barrels to be shipped to Duluth, one of the points named in the contract. The company refused to ship, claiming Backus had delayed too long—that it was entitled to 30 days' notice in advance, which could not then be given before October 15th, the close of the season for shipment. In November, 1905, the company notified Backus it had declared the contract forfeited for the reason that he had committed a breach of it and that it would make no more deliveries. Shortly afterwards Backus brought the action. There was much correspondence between the parties, but all the facts material to our inquiry have been stated. We may add, however, that a letter from Backus, dated September 14, 1905, is not regarded as containing a direction for shipment under the contract.

Did the contract contemplate fulfillment by continuous shipments throughout the season of 5,000 to 10,000 barrel lots, and that Backus should give 30 days' notice in advance of each shipment ordered? If so, Backus was in default in September when he pressed the company for delivery. On the other hand, was the provision for shipments in the lots specified for the benefit and convenience of Backus alone, and was the company obligated to ship on October 15th, without previous notice, all of the 1905 cement not previously sent on orders from Backus? If so, Backus was not in default. The trial court adopted the latter view, and so instructed the jury that, after disposing of an-

other question not necessary to mention, nothing was left them but the assessment of damages. The court held that the words "in advance," at the end of the above excerpt from the contract, applied to the shipments and not to the notice, and as so construed it provided that 30 days' notice should be given of advance shipments required; that is to say, only such shipments as were ordered to be made prior to October 15th.

It was contemplated that the company should make shipments by water, and the period therefor was limited from the opening of navigation to the 15th of October. It could not have been required to ship earlier or later than the time mentioned. Two places of delivery were specified, the option of selection being with Backus; but he could not require delivery elsewhere. It was provided that shipments were to be made, after navigation opened and to continue throughout the season, in 5,000 to 10,000 barrel lots as required by Backus. There is reason for saying that the option of Backus in this respect was as to the size of the shipments within the limits specified, and perhaps, also, as to just when they should be made, but not whether there should be shipments at all before the end of the season. Otherwise, why should it have been provided that the shipments were to continue throughout the season? If Backus alone had control of the matter of time, he could have required continuous shipments without definite provision to that effect in the contract. Backus was required to "give 30 days' notice of shipments to be made, in advance." It can as well be said that the notice was to be in advance of shipments required as that it applied only to advance shipments. We do not think the structure of the sentence makes the latter construction preferable. It is said that "in advance" would be unnecessary to the notice as it would be implied—that 30 days' notice means 30 days' notice in advance. It is common practice, however, in drafting instruments providing for notice, to say that it shall be given before or prior to or in advance of the day or happening to which it relates. It is certain that some sort of notice by Backus was always and in every event necessary; otherwise, the company would not know whether to ship to Duluth or to Port Arthur. The warehousing of such a large quantity of cement at the factory after it was manufactured and the securing of space in vessels for water carriage furnish substantial arguments that the provision for shipments from time to time during the season and notice was in part at least for the benefit of the company.

But there are other provisions which we think make the construction altogether clear. It was provided in the contract that the cement should "bear the test and specifications according to the specifications hereto attached," and it was provided in the specifications attached that the cement should be sampled for test at the factory "approximately on the date that notice of shipment is given" by Backus. The sampling for a test was not the test itself. The sampling was but a preliminary step. The test came afterwards. The samples were to be tested either at the laboratory of the company, or at the office of Backus' engineer in New York City, or elsewhere, as he might elect. To test the soundness of the cement, and to determine whether it would

show distortion or cracks in use, it was specified that a pat of neat cement mixed with water should be allowed to set and then be placed in fresh water for 28 days. It appeared from the evidence that different lots of cement manufactured by a single concern were not always of uniform, unvarying quality. After being ground, the cement had to be cured and ripened to fit it for the market, and weather conditions had an effect upon the duration of that process. It was important to the company that the quality of the cement, which was required to be of a fixed standard, should be determined before it was shipped to distant points; otherwise, it might be rejected there and left upon its hands. So it was provided that the cement should be sampled, approximately on the day that notice of shipment was given, and this, being 30 days in advance, opportunity was given for the tests required. That in the course of performance of the contract Backus might waive the tests does not affect the relevance of these provisions to the construction of the language employed. Notice in advance was of benefit to the company, and it was indispensable to compliance with positive requirements of the contract. We think that the company was entitled to 30 days' notice in advance of every shipment ordered. This was the position it consistently maintained in its correspondence, and it was not until September that Backus took exception to it. When he did so, it appeared from his letter that the market for cement had stiffened.

A failure to order and give notice as required by the contract was equivalent to a failure to take and receive. The contract was a sale and purchase of 100,000 barrels of cement. It was not divisible into separate contracts for lots of 5,000 to 10,000 barrels each, or for 25,000 barrels in 1905 and 75,000 in 1906. The failure of Backus to take and receive 20,000 barrels in 1905 in the manner and during the time prescribed by the contract set the company free, and it seasonably asserted its right.

In *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366, a contract was made for the sale and delivery at Philadelphia of 5,000 tons of iron rails to be shipped from European ports at the rate of "about 1,000 tons" per month, beginning February; shipments to be completed not later than July. The seller shipped 400 tons in February and 885 tons in March, when about the time of the receipt of the March shipments the purchaser rescinded the contract for failure to deliver in the quantity contracted for. The court, after observing that time is of essence in the contracts of merchants, held that:

"A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law; that is to say, a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract."

It was also said:

"The plaintiff, instead of shipping about 1,000 tons in February and about 1,000 tons in March, as stipulated in contract, shipped only 400 tons in February and 885 tons in March. His failure to fulfill the contract on his part in respect of these first two installments justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission."

See, also, *Cleveland Rolling Mills v. Rhodes*, 121 U. S. 255, 7 Sup. Ct. 882, 30 L. Ed. 920.

In *Hoare v. Rennie*, 5 H. & N. 19, a leading case, cited with approval in *Norrington v. Wright*, there was a contract whereby plaintiffs sold to defendants for delivery in London 6,660 tons of iron to be shipped from Sweden in the months of June, July, August, and September in about equal portions each month. In June plaintiffs shipped but a small quantity, and the defendants refused to receive the same, and also gave notice that they refused to receive the residue of the iron. It was held that the plaintiffs could not recover.

In *Honck v. Muller*, 7 Q. B. D. 92, there was a contract for the sale of 2,000 tons of pig iron to be delivered "in November, or equally over November, December, and January next." The purchaser failed to take any iron in November, but demanded delivery of one-third in December and one-third in January. It was held that the seller was justified in rescinding the contract. This case is also cited with approval in *Norrington v. Wright*, while *Mersey Co. v. Naylor*, 9 App. Cas. 434, decided by the House of Lords was distinguished. This latter case and those following its doctrine are relied on by counsel for Backus in the case at bar. The rule of *Norrington v. Wright* has been applied many times by our courts, national and state.

It is contended that by expressions in letters commencing with one written September 18, 1905, the company waived the right to declare the contract at an end. It does appear that at first the company was averse to canceling the contract, meaning in its entirety, especially in view of the basis of cancellation demanded by Backus a few days previous. Shortly afterwards it expressed a desire to keep the contract alive for the deliveries of 1906; but Backus, who had already defaulted, did not accept or act upon the suggestion. Then was the time for adjustment; but his position was wholly antagonistic. He insisted upon immediate further shipments, without the notice upon which alone the company was called upon to make them, and threatened to buy in the open market for its account. While he was in that attitude the company asserted its right to full rescission. It had not precluded itself from doing so.

The judgment is reversed, and the cause remanded for a new trial.

(156 Fed. 948.)

LEE v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. November 5, 1907.)

No. 1,306.

1. CRIMINAL LAW—PLEA OF MISNOMER—TIME FOR FILING.

A defendant cannot interpose a plea of misnomer after having challenged the sufficiency of the indictment by a motion to quash.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 643.]

2. SAME—WAIVER OF OBJECTIONS.

Objection to the overruling or striking out of a plea of misnomer is waived by the subsequent filing of a demurrer to the indictment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 644; vol. 27, Indictment and Information, § 634.]

3. INDICTMENT—DUPLICITY—POST OFFICE—MAILING UNMAILABLE MATTER—SUFFICIENCY OF INDICTMENT.

An indictment under Rev. St. § 3893, as amended by Act Sept. 26, 1888, c. 1039, § 2, 25 Stat. 496 [U. S. Comp. St. 1901, p. 2658], charging the defendant with having mailed a letter giving information where and how, and of whom and by what means, articles and things designed and intended "for the prevention of conception and for the procuring of abortion" might be obtained, does not charge two offenses.

[Ed. Note.—Nonmailable matter, see note to *Timmons v. United States*, 30 C. C. A. 79.]

In Error to the District Court of the United States for the Northern District of California.

Louis P. Boardman and Wm. H. H. Hart, for plaintiff in error.

Robt. T. Devlin, U. S. Atty., and Benj. L. McKinley, Asst. U. S. Atty.

Before GILBERT and ROSS, Circuit Judges, and HUNT, District Judge.

ROSS, Circuit Judge. The indictment in this case was against "B. Brooks Lee, alias R. Brooke Sterling, whose true name is to the grand jurors aforesaid unknown." It charged that person with willfully, knowingly, and feloniously depositing at a certain stated time in the post office at San Francisco, for mailing and delivery, a certain letter inclosed in a sealed envelope, upon which the postage was prepaid, addressed to Miss Jennie Meredith, Goshen, Ind., R. R. 8, which letter was in these words and figures:

"Telephone South 946. Office Hours: 10 a. m. to 12 m., 2 to 5 and 7 to 8 p. m. R. Brooke Sterling, M. D., Specialist for the Diseases of Women, 1140 Market Street.

"San Francisco, Jan. 9th, 1905.

"Jennie Meredith, R. R. 8, Goshen, Ind.—Dear Miss: In answer to yours of the 2d inst. will say that upon receipt of ten (\$10.00) dollars from you I will send per express necessary treatment with full instructions.

"Respectfully,

R. Brooke Sterling, M. D., per L."

The indictment further charged that the letter so deposited "then and there gave information where and how, and of whom, and by what means, divers articles and things designed and intended for the prevention of conception and for the procuring of abortion might be obtained," contrary to the provisions of section 3893 of the Revised Statutes, as amended by Act Cong. Sept. 26, 1888, c. 1039, § 2, 25 Stat. 496 [U. S. Comp. St. 1901, p. 2658]. On the 1st day of April succeeding the finding of the indictment a motion to quash it on various grounds was filed in the court below, entitled, "The United States of America, Plaintiff, v. B. Brooks Lee, Defendant," the opening clause of which motion is as follows:

"Now comes the defendant above named, by Louis P. Boardman, his attorney, and objects to the indictment in the above-entitled action, and moves the court to quash, set aside, and dismiss said indictment, upon the following grounds"

—and specifying various grounds, among others, that the indictment charges two offenses in one count. The motion to quash was over-

ruled by the court, after which, to wit, on the 19th day of April, 18 days after the motion was made, the defendant filed what he denominated a "Plea of Misnomer," and which is as follows:

"Benjamin Brooks Lee, who is indicted by the name of B. Brooks Lee, alias 'R. Brooke Sterling,' in his own proper person now comes into court, and, having heard the said indictment read, says that he was named by the name of Benjamin Brooks Lee, to wit, at the city of Columbia, in the state of South Carolina, and by the Christian name of Benjamin Brooks, and has also, since his naming, been called and known by the name of Benjamin Brooks Lee; without this, that he, the said Benjamin Brooks Lee, is not now, nor at any time hitherto, has been called or known by the Christian name of B. Brooks, or by the said alias name of 'R. Brooke Sterling,' as by the said indictment is alleged, and that this, the said Benjamin Brooks Lee is ready to verify. Wherefore, he prays judgment of the said indictment and that the same may be quashed, and that he be permitted to go hence without day."

On motion of the government's attorney this plea was stricken from the files, but after a demurrer thereto interposed by the government had been overruled. Subsequent to the striking out of the plea the plaintiff in error interposed a demurrer to the indictment, and substantially on the same grounds that were stated in his motion to quash, which demurrer was also overruled by the court. The plea was properly stricken out, first, because, after having challenged the sufficiency of the indictment by a motion to quash it, it was too late for the defendant to interpose a plea of misnomer. *Grimes v. State*, 105 Ala. 86, 17 South. 184; *State v. Winstrand*, 37 Iowa, 110; *Ellis v. State*, 25 Fla. 702, 6 South. 768. In the next place, the defendant by subsequently filing his demurrer to the indictment waived his plea of misnomer. *Haley v. State*, 63 Ala. 89. Lastly, the plea interposed shows upon its face that it was not in substance and legal effect a plea of misnomer.

Upon the merits of the case but little need be said. The indictment does not charge two offenses. The charge relates to but a single letter, alleged to have contained prohibited matter and to have been deposited by the plaintiff in error in the mail for transmission therein. We cannot at all agree with counsel for the plaintiff in error that the letter counted on by the government was innocent on its face. On the contrary, the plain inference to be drawn from its wording and caption was that charged in the indictment.

The judgment is affirmed.

(156 Fed. 773.)

STEWART v. BOARD OF TRUSTEES OF PARK COLLEGE et al.*

(Circuit Court of Appeals, Eighth Circuit. October 14, 1907.)

No. 2,490.

JUDGMENT—CONCLUSIVENESS OF ADJUDICATION—MATTERS CONCLUDED.

A final decree of a state court in a suit brought for the cancellation of a mortgage and foreclosure deed on condition of paying the mortgage debt with interest and costs, even though on demurrer, is a bar to a subsequent suit in a federal court for the same purpose against the same defendants or their privies; the grounds relied upon in the pleading being the same in both actions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 987-993, 1513.

Conclusiveness as between federal and state courts, see notes to *Kansas City Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank v. City of Memphis*, 49 C. C. A. 468.]

Appeal from the Circuit Court of the United States for the District of Kansas.

C. H. Nearing (Amos Townsend, on the brief), for appellant.

H. L. Alden, for appellee Cemetery Association.

Robert E. Morris (J. E. McFadden, on the brief), for appellee Board of Trustees of Park College.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This was a suit to remove a cloud from Stewart's title to land in Wyandotte county, Kan., claimed to have been caused by a sale under a decree of foreclosure of a mortgage which he had executed to secure a loan made to him by the defendant college.

The college was a corporation of Missouri organized for educational purposes. Having money for investment, it loaned \$20,000 to Stewart, and took as security for the payment of a note representing the loan the mortgage in question. Stewart failed to pay the note at its maturity and suit was instituted by the college in the district court of Wyandotte county, Kan., to foreclose the mortgage. Stewart duly appeared to the action and filed his answer, consisting of a general denial and plea of payment. In due course, October, 1900, a decree of foreclosure followed, the land was duly advertised and sold, and the college became the purchaser. In June, 1902, after the expiration of the time within which the mortgagor might redeem under the Kansas statutes, a deed was duly executed conveying the land to the college. In August, 1902, Stewart instituted suit in the same court against the defendant college. In his petition he set up the facts just recited, and further alleged that defendant was a foreign corporation organized as an educational institution under the laws of Missouri, and as such had no power to loan money in Kansas or take real estate mortgage as security for its payment; that it had not complied with certain statutory provisions to entitle it to do business in Kansas; and that it misled and deceived him, and thereby prevented him from exercising his statutory right to redeem the land from the foreclosure sale within the time permitted by law.

*Rehearing denied December 28, 1907.

His prayer was that defendant be required to reconvey the land to him upon his paying the principal and interest of the original loan and the costs and taxes paid by it. He also prayed for general relief. The defendant duly appeared and filed demurrer to the bill for want of equity. The demurrer was sustained and final decree rendered in its favor. From that judgment an appeal was duly prosecuted to the Supreme Court of Kansas, where, in February, 1904, the decree was in all things affirmed. Upon the coming down of the mandate of affirmance Stewart filed a motion for leave to file an amended petition. This was denied, defendant's motion for judgment in accordance with the mandate was sustained, and judgment was accordingly entered. From this order denying him the right to file the amended petition Stewart again appealed to the Supreme Court, where in May, 1905, the action of the district court was again affirmed.

The bill in the present suit instituted in January, 1906, discloses the facts recited in the former suits, and charges misconduct on the part of the board of trustees of the college which misled Stewart to his injury in the matter of redeeming from the foreclosure sale, want of corporate power in the college to acquire or hold property, and failure on the part of the college to comply with the laws of Kansas enabling it to do business in that state. The prayer was that, upon repayment by Stewart of the amount of the original loan with interest and costs, the cloud consisting of the mortgage and foreclosure deed be removed, and that defendants be declared to have no estate or interest in the lands mortgaged. He also again prayed for general relief. To this bill the defendants filed answers, denying all charges of improper or misleading conduct on the part of the board of trustees, affirming the authority and power of the college to make loans, to take a mortgage, and purchase the land in question, and particularly pleaded the decrees in the foreclosure suit and the suit to redeem as estoppels by judgment upon complainant's right of present action. The court below, after a finding of facts by a special master substantially as just stated, entered a decree dismissing the bill. The former decrees were held to be conclusive estoppels and to bar the complainant's right of recovery in this case.

Without stopping to consider the effect of the judgment in the foreclosure case which is claimed by counsel for the college to constitute a complete bar to the present action, we take up a consideration of the second case, the one instituted by Stewart to set aside the deed to the college. That suit was instituted by Stewart against the college and an intermediary, the agent of the syndicate to whom title was conveyed for the purpose of organizing the cemetery association, a defendant in this present case. That case was instituted in a court which had jurisdiction of the subject-matter of the action and of the parties to it. The parties were either the same or in privity with the parties to the present action. The object of the suit or claim sued on was the same as in the present one, namely, to secure a decree setting aside the mortgage and foreclosure deed on condition of paying to the college the amount of the original loan with interest and costs. The grounds of Stewart's alleged right were practically the same in both cases, namely, (1) want of power in

the college to make the original loan and take real estate security for payment; (2) failure by the college to comply with laws of Kansas enabling it to do business in that state; (3) misconduct of the college preventing Stewart from exercising his right to redeem within the statutory period. The judgment in the former suit is undoubtedly a bar to the present action. It was upon the same claim and between the same parties, and the decisive questions raised by the pleadings in this case were the same, and were necessarily decided in that, even though it went off on demurrer. *Cromwell v. County of Sac*, 94 U. S. 351, 352 (24 L. Ed. 195); *Gordon v. Ware Nat. Bank*, 65 C. C. A. 580, 132 Fed. 444, 449 (67 L. R. A. 550); *Wiggins Ferry Co. v. O. & M. Ry.*, 142 U. S. 396, 12 Sup. Ct. 188, 35 L. Ed. 1055; *Gould v. Evansville, etc., R. Co.*, 91 U. S. 526, 23 L. Ed. 416. Learned counsel for Stewart earnestly argue that as the mortgage constituted no lien because *ultra vires*, and as the college could not acquire any interest in the realty in question because of want of power, the former judgment establishing such a mortgage and title acquired under it was beyond the power of the court, and therefore works no estoppel in this case. This argument misinterprets the whole doctrine of *res adjudicata*. That doctrine rests upon the wisdom and public policy of putting an end to litigation. It jealously secures and guards the right of every person to a day in court—to an opportunity to have his claim adjudicated by a court of competent jurisdiction—but, when that opportunity has been once fully afforded, public policy demands that litigation on the same claim and between the same parties or their privies shall forever cease. The courts of Kansas had a full opportunity to hear and fully heard Stewart's contention that the college acquired no title by its mortgage and foreclosure proceedings and finally decided the question adversely to him. They were courts endowed with jurisdiction to hear and decide the very question submitted to them, and it is not for us or any other court not exercising appellate jurisdiction over them to re-examine between the same parties the question so finally determined.

In view of the clear showing made by the record that the present suit amounts to nothing else than an attempt to relitigate the questions once litigated between the same parties to a final conclusion in the courts of Kansas, we find no occasion to consider the many other interesting questions argued by counsel.

The Circuit Court correctly dismissed the bill, and its judgment is accordingly affirmed.

(156 Fed. 775.)

DAVIS v. CLEVELAND, C., C. & ST. L. RY. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. October 19, 1907.)

No. 2,504.

COURTS—CIRCUIT COURTS OF APPEALS—JURISDICTION.

Where the power of a Circuit Court of the United States to proceed to the trial of an action against a nonresident defendant depends on whether there has been a general appearance by defendant, or, if not, upon the validity of attachments and garnishments of property within the district,

both such questions are jurisdictional, and a decision of the court determining them in favor of the defendant and dismissing the action for want of jurisdiction is reviewable only by the Supreme Court under sections 5 and 6 of the Circuit Court of Appeals act of March 3, 1891 (26 Stat. 827, 828, c. 517 [U. S. Comp. St. 1901, pp. 549, 550]).

[Ed. Note.—Jurisdiction of circuit court of appeals in general, see notes to *Law Ow Bew v. United States*, 1 C. C. A. 6; *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 475.]

In Error to the Circuit Court of the United States for the Northern District of Iowa.

For opinion below, see 146 Fed. 403.

Wilbur Owen and Thomas F. Bevington, for the plaintiff in error.
W. H. Farnsworth (Deloss C. Shull and J. U. Sammis, on the brief),
for the defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. Charles A. Davis, as executor, sued the Cleveland, Cincinnati, Chicago & St. Louis Railway Company in a state court of Iowa upon a cause of action for the death of his testate which occurred in Illinois. The defendant railway company was organized under the laws of Indiana and Ohio, and owned and operated lines of railroad in those states and in Illinois, but it had no lines of road and no agents or agencies in Iowa where the action was brought. So, to obtain jurisdiction, the plaintiff caused an original notice of the commencement of the action containing also an admonition to answer by a specified date to be served on the secretary of defendant at its general offices in Cincinnati, Ohio, and also caused writs of attachment and garnishment to be issued directed for service to sheriffs of counties in Iowa. The writs of garnishment were served upon certain railroad companies doing business in Iowa and having traffic relations with the defendant, and some freight cars of the defendant in the possession of the garnishees were also attached. Notice of the attachments and garnishments was served on defendant in Ohio. The defendant removed the cause to the Circuit Court of the United States for the Northern District of Iowa, and thereupon filed in that court its motion, in which it said that it appeared specially for the purpose of objecting to the jurisdiction of the court over its person and its property, and it moved to quash and set aside the service of the writs of attachment and garnishment. The plaintiff filed a resistance to the motion. Upon hearing the Circuit Court held that defendant's appearance was not a general one, and therefore it had not submitted itself to the jurisdiction of the court; that the service of the notices in Ohio did not confer jurisdiction of the person; that the cars attached in Iowa were temporarily there having been brought by the garnishees into that state from points without; and that, when brought within the state and when attached, they were employed in interstate commerce and in the fulfillment of duties in respect of such commerce imposed on defendant and the garnishees, its connecting carriers, by the laws of the United States; that the credits of defendant in the hands of the garnishees were shifting traffic balances ascertainable and payable at Chicago, Ill., and a part of

and inseparably connected with the commerce mentioned; that the cars were not attachable and the credits not subject to garnishment, and therefore the court had not lawfully secured jurisdiction of any property of defendant. The motion to quash was sustained, and the action was dismissed without prejudice. The plaintiff sued out a writ of error from this court.

It is not claimed by plaintiff that service of the notices in Ohio was effectual to confer jurisdiction over the person of defendant. These are the questions: Was defendant's appearance to contest the validity of the attachments and garnishments a general one? Were the cars and credits of defendant subject to attachment and garnishment? In other words, did the trial court secure such dominion over person or property by appearance or process as authorized it to proceed to trial of the action and render a valid judgment upon the issues involved? The trial court answered them in the negative and dismissed the action for want of jurisdiction. In respect of the essential character of these questions, they are not distinguishable from one of the legality of the service of summons upon a defendant. They do not pertain to the merits of the case, and did not arise during the progress of a trial. They lay at the threshold, and upon an affirmative answer depended the power of the court to hear and decide the cause. In legal phraseology that power is termed "jurisdiction." It is none the less a jurisdictional matter in the case of attachment and garnishment of property of a nonresident because the power of the court to proceed to trial depends in the absence of the defendant upon its lawful seizure of his property. The question of jurisdiction was decided in favor of defendant and the decision disposed of the case. Under the Court of Appeals act of 1891 (Act March 3, 1891, c. 517, §§ 5, 6, 26 Stat. 827, 828 [U. S. Comp. St. 1901, pp. 549, 550]) the Supreme Court alone has power to review such a decision. *Board of Trade v. Hammond Elevator Co.*, 198 U. S. 424, 25 Sup. Ct. 740, 49 L. Ed. 1111; *United States v. Jahn*, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87; *St. Louis Cotton Compress Co. v. American Cotton Co.*, 125 Fed. 196, 60 C. C. A. 80.

The writ of error is dismissed.

(156 Fed. 958.)

HESSIAN v. PATTEN et al.

(Circuit Court of Appeals, Eighth Circuit. October 21, 1907.)

No. 2,503.

APPEAL AND ERROR—REVIEW—QUESTIONS CONSIDERED.

A question not put in issue by the pleadings, nor covered by the decree of the court below, and the determination of which was not necessary to the decision made, will not be determined by the appellate court, although the trial court may have made a finding thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3331, 3341.]

On motion for rehearing. Denied.

For former opinion, see 154 Fed. 829, 83 C. C. A. 545.

Before SANBORN and HOOK, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. A petition for a rehearing or for a modification of the opinion in this case, so that it may indicate the status of the claim made by William H. Patten to a homestead in his life estate in the lot and store building which he conveyed to Mrs. Taylor, has been submitted. The purpose and the prayer of the bill were that the deed from Patten to Mrs. Taylor, whereby he reserved his life estate and conveyed the remainder to her, which was made on February 15, 1902, should be adjudged fraudulent and void against the creditors of his estate in bankruptcy, and against the complainant, their trustee. The bill did not mention his claim for a homestead, nor did it seek any relief against it. The answer was that the deed assailed was valid, and the prayer of the defendants was that the relief sought by the complainant should be denied, that the deed should be declared valid, and that they should have general relief. They did not pray for any adjudication or affirmance of any homestead claim of William H. Patten. To this answer the complainant filed a general replication. The defendants filed no cross-bill to establish or obtain an adjudication of Patten's claim to the homestead. There was, it is true, an averment in the answer that on October 23, 1903, Patten moved into the store building, that he occupied the lot on which it stood as his homestead, and that he had then and subsequently claimed it as such. The judge who heard the case below filed findings of fact and conclusions of law in which he declared that Patten occupied and claimed the property as a homestead, and that he had a valid homestead in it, before the proceedings in bankruptcy were instituted; but they were never carried forward to, nor embodied in, the decree which determined the suit, nor was an adjudication of the homestead issue necessary to the decree that was rendered. That decree was that the bill be dismissed, and that the defendants recover their costs, and it contained no other adjudication. The result is that the question whether or not Patten had a homestead in his life estate in this property was not presented for adjudication by proper pleadings, it was not adjudicated in the court below, it was not presented to this court for review, nor was it here decided.

The proceedings in this suit do not render that question res adjudicata, and the motion for a rehearing, or for a modification of the opinion, is denied.

(156 Fed. 957.)

SCHROEDER v. UNITED STATES.

ENGELHARD v. SAME.

(Circuit Court of Appeals, Second Circuit. November 8, 1907.)

Nos. 76, 77 (4,242, 4,243).

CUSTOMS DUTIES—CLASSIFICATION—FLINT TILES—SPECIFIC DESIGNATION.

Of the provisions in Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 88, 30 Stat. 155 [U. S. Comp. St. 1901, p. 1632], (1) for "tiles, plain unglazed, one color, exceeding two square inches in size," and (2) for "tiles
• • • semi-vitrified, flint," etc., the latter is more specific; and tiles embraced in both descriptions are dutiable under the latter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs Duties, § 43.]

Appeals from the Circuit Court of the United States for the Southern District of New York.

These are appeals by Rudolph Schroeder and Charles Engelhard from a decision of the Circuit Court, affirming decisions of the Board of United States General Appraisers, which had affirmed the assessment of duty by the collector of customs at the port of New York. The opinion rendered in the Circuit Court is as follows:

HOUGH, District Judge. No importance can be attached to the use of the word "vitrified" by the witnesses. They evidently regard the word as synonymous with "vitrified." The very matter here litigated seems to have been considered in G. A. 4,281 (T. D. 20,127) very shortly after the present tariff act went into effect. Tiles of the same kind as are now under consideration were also investigated in G. A. 3,704 (T. D. 17,656) shortly before the passage of the act of 1897. Comparing these two decisions with the testimony in this case, I am convinced that the articles in question were, prior to 1897, known as "flint tiles," and were inserted in the act of 1897 by their trade designation. I think therefore that the sort of tile shown by the illustrative Exhibit A (November 8, 1906) was properly classified as a flint tile. I am in some doubt as to whether said Exhibit A is semi-vitrified, but the testimony on that head is not sufficiently strong to disturb the finding of the Appraisers.

The subject of protest in the second suit, as shown by Exhibit 1 (175,685, February 16, 1906), seems to me to be clearly semi-vitrified.

The decision of the Appraisers is sustained.

The case involves the construction of Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 88, 30 Stat. 155 [U. S. Comp. St. 1901, p. 1632], reading as follows:

"Par. 88. Tiles, plain unglazed, one color, exceeding two square inches in size, four cents per square foot; glazed, encaustic, ceramic mosaic, vitrified, semi-vitrified, flint, spar embossed, enameled, ornamental, hand painted, gold decorated, and all other earthenware tiles, valued at not exceeding forty cents per square foot, eight cents per square foot; exceeding forty cents per square foot, ten cents per square foot and twenty-five per centum ad valorem."

The articles in controversy were plain unglazed tiles of one color, exceeding two square inches in size. The Board of General Appraisers and the Circuit Court found them to be flint or semivitrified,

and held them to have been properly classified as such under the second subdivision of said paragraph. The importers disputed the correctness of the finding that they were either flint or semivitrified tiles, and contended further that, even if they were tiles of those classes, they were more specifically designated under the provision in the first subdivision for "tiles, plain, unglazed, one color," etc.

Hatch & Clute (Walter F. Welch, of counsel), for importers.
J. Osgood Nichols, Asst. U. S. Atty.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. Decision affirmed.

(156 Fed. 958.)

JOHN BROMLEY & SONS v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. November 11, 1907.)

No. 9 (1,773).

CUSTOMS DUTIES—CLASSIFICATION—FINISHED CASTINGS.

Iron castings, which by careful additional work have been fitted as parts of machines, are no longer dutiable as "castings," under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 148, 30 Stat. 162 [U. S. Comp. St. 1901, p. 1640], but have been advanced to the condition of "articles * * * of iron * * * partly * * * manufactured," under paragraph 193, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645].

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For decision below, see 154 Fed. 399, affirming a decision of the Board of United States General Appraisers, which had affirmed the assessment of duty by the collector of customs at the port of Philadelphia.

Hatch & Clute (Walter F. Welch, of counsel), for importers.

Jasper Yeates Brinton (J. Whitaker Thompson, U. S. Atty., on the brief), Asst. U. S. Atty.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. John Bromley & Sons, the appellants, bought certain lace machines from one Jardine, an English lace machine manufacturer. The machines were shipped in parts, each of which parts was numbered with the individual number of the machine for which it was made. The parts here in question are standards for shafts and bed plates supporting such standards, and were described by Jardine in his invoice affidavits as "castings forming parts of machines sold by me to John Bromley & Sons, Philadelphia." The collector, and his action has been sustained by the Board of Appraisers and the Circuit Court, classified them, under paragraph 193 of the tariff act (Act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645]) as "Articles * * * composed wholly * * * of iron * * * partly * * * manufactured." From the decree of the Circuit Court so holding, the importers have ap-

pealed, claiming they should be classified, under paragraph 148, as "Castings of iron not specially provided for."

We find no error in the Circuit Court's decree. While a cast-iron article always remains a casting of iron, no matter to what further process it may be subjected, and so falls under the general term of castings of iron, yet, under the proofs in this case, we are clear that these standards and bed plates are not "castings of iron not specially provided for" in the tariff law, but fall within the letter and spirit of section 193 as being articles composed wholly of iron partly manufactured. They were found by the board to be "parts of the machines of which they formed integral parts and in the values of which their values are included." They were cast by patterns and drawings to form parts of a machine; the standards were drilled to receive shafts and to provide for bolting to the plates; and the plates were cut or machined across their faces to level them as standard seats. Holes were drilled and threaded in the plates so as to align with the bolts of the standards, and other holes were drilled, through which the machine as a whole was clamped to the floor. Indeed, the testimony on behalf of the importer shows:

"The order for the machinery is given and all these articles are supposed to come to complete the machine." The work in this country is to "just fit and level them up." "No boring is done here." They are "all fitted and ready to be put up." "The exhibit belongs to the finished castings class."

In view of the careful work thus expended on them to fit them as parts of valuable machines, we are clear their character as mere castings had merged into the higher mechanical plane of a manufactured article.

The appeal is dismissed.

(156 Fed. 959.)

MASON et al. v. CHICAGO, B. & Q. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. October 9, 1907. Rehearing Denied November 19, 1907.)

No. 1,330.

CORPORATIONS—SALE OF STOCK.

The acceptance by defendant of a written offer by plaintiffs, who were brokers, to sell certain stock and bonds of a railroad company, which offer was expressly stated therein to be made by authority of a third person named who controlled such stock and bonds, did not create a contract of sale between plaintiffs and defendant which would support an action by plaintiffs on defendant's refusal to accept and pay for the securities from them, and its purchase of the same direct from their principal.

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

Merritt Starr, for plaintiffs in error.

John J. Herrick, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge. Plaintiffs in error, plaintiffs below, were defeated by the court's giving a peremptory instruction to the jury to return a verdict for defendant.

The general situation out of which this controversy arose was shown by undisputed evidence to be this: Dunn, at Philadelphia, had in his control, with authority to sell, practically all the stocks and bonds of a small railway in Illinois. Defendant wanted to buy the road. Plaintiffs were brokers at Chicago. After communications between plaintiffs and Dunn, plaintiffs made a proposal to defendant that it should buy the stocks and bonds at certain prices. Defendant accepted, but later refused to have anything further to do with plaintiffs, and purchased the stocks and bonds directly from Dunn.

The declaration consisted of the common and four special counts. It is unnecessary to note the divergences of the special counts. They agreed in the foundational and characteristic averment that the parties had entered into a contract whereby plaintiffs had covenanted to sell to defendant and defendant to buy from plaintiffs the stocks and bonds. The evidence in support of the alleged contractual relation between these parties was in the form of letters. Plaintiffs wrote to defendant:

"We are advised by J. H. Dunn, president of J. & St. L. R. R., that the securities covering the property are as follows * * * and that he has received from the owners of the above securities consents to sell the following * * * which we are authorized to offer on the following terms. * * *"

Defendant answered:

"We will accept the offer of the securities of the J. & St. L. made by you."

Plaintiffs did not offer to sell on their own account. They merely covenanted that they had authority to offer to sell. In our judgment the trial court did not err in holding that this evidence failed to support the above-mentioned averment of the special counts.

The common count for goods sold and delivered is without support in the evidence. There was no express contract of sale by plaintiffs as sellers; and no contract between plaintiffs as sellers and defendant as buyer can be implied from defendant's receipt of the stocks and bonds, for they were taken directly from Dunn, as Dunn's, on Dunn's account, and in pursuance of a separate contract with Dunn.

If anything is owing to plaintiffs for services rendered, they must pursue some one else, for there is no evidence whatever to sustain that count against defendant.

The trial was not stopped at the close of plaintiffs' evidence in chief, and numerous assignments of error are predicated on rulings respecting the admission and exclusion of evidence during defense and rebuttal, and concerning the rejection of proffered instructions. As plaintiffs legally had no standing in court when their declaration was left unproven, the other proceedings are of no concern.

The judgment is affirmed.

(156 Fed. 881.)

UNITED STATES v. CHAMBERLIN et al.

(Circuit Court of Appeals, Eighth Circuit. October 17, 1907.)

No. 2,422.

1. INTERNAL REVENUE—STAMP TAXES ON WRITTEN INSTRUMENTS—MODE OF ENFORCEMENT.

The United States cannot maintain an action of debt for the recovery of stamp taxes owing on a deed of conveyance under War Revenue Act June 13, 1898, c. 448, § 25, Schedule A, 30 Stat. 457 [U. S. Comp. St. 1901, p. 2299], by reason of the failure to affix the required stamps thereto. There being no express authority in the statute for such a proceeding, the means of enforcing payment of the tax are limited to the penal provisions contained therein.

2. TAXATION—"DEBT" DEFINED—TAXES NOT DEBTS.

A tax is not a "debt" within the ordinary meaning of the term, nor in such sense that an action of indebitatus assumpsit may be maintained for its collection, unless expressly authorized by statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1185.

For other definitions, see Words and Phrases, vol. 2, pp. 1864–1887; vol. 8, p. 7628.]

Hook, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Colorado.

Ralph Hartzell, Asst. U. S. Atty. (Earl Cranston, U. S. Atty., and Ernest Knaebel, Sp. Asst. U. S. Atty., on the brief), for plaintiff in error.

O. L. Dines (E. E. Whitted, on the brief), for defendants in error.

Before SANBORN and HOOK, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. In 1905 the plaintiff in error, the United States of America, instituted this suit in the United States District Court for the District of Colorado, to recover of the defendants in error, as executors of the will of Winfield Scott Stratton, the sum of \$4,883, the amount of revenue stamps alleged to be owing by said estate on a deed of conveyance made by said Stratton on the 23d day of May, 1899, conveying to Stratton's Independence Limited, a corporation, certain mining property located in the Cripple Creek mining district of Colorado. The petition alleged that the consideration expressed in the deed was \$4,850,000, on which revenue stamps were placed amounting to \$4,850; whereas, the true and actual consideration for the conveyance was \$9,733,000, leaving the amount of stamps due \$4,883. The court below sustained a demurrer to this petition. To reverse this judgment the United States prosecutes this writ of error.

The question for decision is, can the government maintain the action of indebitatus assumpsit for the recovery of such tax? The tax claimed arose under what is popularly known as the "Spanish War tax," provided for by Act Cong. June 13, 1898, c. 448, 30 Stat. 448 [U. S. Comp. St. 1901, p. 2284 (2 Supp. Rev. St. No. 8, 1897–1899)]. Under Schedule A it is provided that on a deed conveying lands, ten-

ements, or other realty, "the purchaser or purchasers, or any other person or persons, by his, her, or their direction, when the consideration or value exceeds one hundred dollars and does not exceed five hundred dollars," shall place a stamp of 50 cents, and for each additional \$500 or fractional part thereof in excess of \$500, 50 cents. Section 25 of the act provides:

"That the Commissioner of Internal Revenue shall cause to be prepared for the payment of the taxes prescribed in this act suitable stamps denoting the tax on the document, article or thing to which the same may be affixed."

The act specifies what the penalty and consequences shall be for a failure to attach to the instrument the required stamps. Section 7 declares:

"That if any person or persons shall make, sign, or issue, or cause to be made, signed, or issued, any instrument, document, or paper of any kind or description whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereon an adhesive stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not more than one hundred dollars, at the discretion of the court, and such instrument, document, or paper, as aforesaid, shall not be competent evidence in any court."

Section 10:

"That if any person or persons shall make, sign, or issue, or cause to be made, signed, or issued, or shall accept or pay, or cause to be accepted or paid, with design to evade the payment of any stamp tax, any bill of exchange, draft, or order, or promissory note for the payment of money, liable to any of the taxes imposed by this act, without the same being duly stamped, or having thereupon an adhesive stamp for denoting the tax hereby charged thereon, he, she, or they shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding two hundred dollars, at the discretion of the court."

Section 13:

"That any person or persons who shall register, issue, sell, or transfer, or who shall cause to be issued, registered, sold, or transferred, any instrument, document, or paper of any kind or description whatsoever mentioned in Schedule A of this act, without the same being duly stamped, or having thereupon an adhesive stamp for denoting the tax chargeable thereon, and canceled in the manner required by law, with intent to evade the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding fifty dollars, or by imprisonment not exceeding six months, or both, in the discretion of the court; and such instrument, document, or paper, not being stamped according to law, shall be deemed invalid and of no effect. [The proviso of this section authorizes the subsequent validation of the instrument by placing the stamps thereon.] But no right acquired in good faith before the stamping of such instrument, or copy thereof, as herein provided, if such record be required by law, shall in any manner be affected by such stamping as aforesaid."

Section 14:

"That hereafter no instrument, paper, or document required by law to be stamped, which has been signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof, shall be recorded or admitted, or used as evidence in any court until a legal stamp or stamps, denoting the amount of tax, shall have been affixed thereto, as provided by law. * * *

Section 15:

"That it shall not be lawful to record or register any instrument, paper, or document required by law to be stamped unless a stamp or stamps of the proper amount shall have been affixed and canceled in the manner prescribed by law; and the record, registry, or transfer of any such instruments upon which the proper stamp or stamps aforesaid shall not have been affixed and canceled as aforesaid shall not be used in evidence."

These are the only provisions of the statute respecting the manner of obtaining the revenue from such conveyances, and they contain the only remedial provisions for the enforcement of payment. The language of section 25 clearly enough indicates that "the payment of the taxes prescribed in this act" shall be by "suitable stamps denoting the tax on the document," etc. These were to be prepared by the Commissioner of Internal Revenue, and when bought from the local collector they were to be affixed to the instrument by the vendor or the vendee. No antecedent assessment was provided for or contemplated in respect of this character of tax.

Reliance for the enforcement of the payment of the tax claimed in this case as a debt owing to the government is placed principally upon the decision in *Savings Bank v. United States*, 19 Wall. 227, 22 L. Ed. 80. The tax in that case was based upon Internal Revenue Act July 13, 1866, c. 184 (14 Stat. 98), which levied a tax of 5 per cent. on bank dividends. The tax was to be paid in money by the bank on the stock of the shareholder. The list or return was required to be made and rendered to the assessor by the bank on or before a given date, in which any dividends or sums of money became due or payable, and the president, cashier, or treasurer of the bank was required to annex thereto a declaration, under oath, in form and manner as prescribed by the Commissioner of Internal Revenue, that the same contained a true and faithful account of the taxes aforesaid; and for any default in making or rendering such list or return, with such declaration annexed, the defaulting bank should forfeit as a penalty the sum of \$1,000, and for failure to make or render the list or return, or for any default in the payment of the tax as required, the assessment and collection of the tax and penalty shall be in accordance with the general provisions of law in other cases of neglect and refusal. From which it is apparent that the amount of the tax to be paid was assessed on a particular fund—a dividend in favor of an ascertained beneficiary—and payment of the amount so assessed was to be made in money by the bank to the collector of internal revenue. While the act provides for the imposition of a penalty in the nature of a forfeiture, on default of the bank in performing the duties imposed upon it, the act went further and expressly declared:

"That it shall be the duty of the collectors aforesaid, or their deputies, in their respective districts, and they are hereby authorized, to collect all the taxes imposed by law, however the same may be designated, and to prosecute for the recovery of any sum or sums which may be forfeited by law; and all fines, penalties, and forfeitures which may be incurred or imposed by law, shall be sued for and recovered, in the name of the United States, in any proper form of action, or by any appropriate form of proceeding, *qui tam* or otherwise, before any circuit or district court of the United States for the district within which said fine, penalty, or forfeiture may have been incurred,

or before any other court of competent jurisdiction. And taxes may be sued for and recovered, in the name of the United States, in any proper form of action before any circuit or district court of the United States within which the liability to such tax may have been or shall be incurred, or where the party from whom such tax is due may reside at the time of the commencement of said action. But no such suit shall be commenced unless the Commissioner of Internal Revenue shall authorize or sanction the proceedings."

With the greatest respect for the eminent jurist who wrote the opinion in the Savings Bank Case, we submit that what is said in the course of the opinion respecting the exemption of the general government from established recognized common-law rights of action and limitations upon the character of action permissible to it, respecting its right to treat a tax as a debt recoverable in the form of *assumpsit indebitatus*, was quite *obiter dictum*, as the statute imposing the tax in question expressly declared that it could be recovered by suit at law, and as disclosed in the facts of the case the Commissioner of Internal Revenue had sanctioned the proceeding. The statute itself was an all-sufficient authority for the maintenance of the suit. The tax itself became a charge upon a particular fund, payable in money, directly to the collector of internal revenue, and possessed none of the qualities of a duty to be paid in stamps. In view of the express provision of the statute providing for the recovery of such a tax by suit, it ought not to be said that it was the mind of the court in the Savings Bank Case to overturn the hitherto generally recognized rule of law that a tax is not regarded as a debt. In *Lane County v. Oregon*, 7 Wall. 71, 79, 80, 87, 19 L. Ed. 101, the Chief Justice, delivering the unanimous opinion of the court, speaking of the clause of the Constitution giving to Congress the power to lay and collect taxes, said:

"What, then, is its true sense? The most obvious, and, as it seems to us the most rational, answer to this question, is that Congress must have had in contemplation debts originating in contract or demands carried into judgment, and only debts of this character. This is the commonest and most natural use of the word. Some strain is felt upon the understanding when an attempt is made to extend it so as to include taxes imposed by legislative authority, and there should be no such strain in the interpretation of a law like this. We are more ready to adopt this view, because the greatest of English elementary writers upon law, when treating of debts in their various descriptions, give no hint that taxes come within either, while American state courts of the highest authority have refused to treat liabilities for taxes as debts, in the ordinary sense of that word, for which actions of debt may be maintained."

Then, quoting from *City of Camden v. Allen*, 26 N. J. Law, 398:

"A tax, in its essential characteristics, is not a debt, nor in the nature of a debt. A tax is an impost levied by authority of government upon its citizens, or subjects, for the support of the state. It is not founded on contract or agreement. It operates in invitum. A debt is a sum of money due by certain and express agreement. It originates in and is founded upon contracts, express or implied."

In *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197, the opinion was written by Mr. Justice Field, who dissented in the Savings Bank Case, *supra*. He asserted broadly that:

"Taxes are not debts. It was so held by this court in the case of *Oregon v. Lane County*, reported in 7 Wall. 71, 19 L. Ed. 101."

It is true that that was not a suit either by the United States or by the state of Tennessee; but it was the assertion of the sovereignty of the state through the legislative authority, and the whole reasoning of the court was that both the levying and collecting of the tax are legislative matters, and are not judicial, and therefore he said:

"Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected and to designate the officers through whom its will shall be enforced. * * * In the distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative."

It is a significant fact that in the dissenting opinion Mr. Justice Strong, who wrote the opinion in the Savings Bank Case, reasserted that:

"By the lawful assessment and levy of a tax the taxpayer becomes a debtor to the municipality, and the debt may be recovered, like other debts, by a suit at law, or, when it is a lien, by a bill in equity."

In *Thompson v. Allen County* (C. C.) 13 Fed. 99, Mr. Justice Matthews, referring to the *Meriwether Case*, said:

"I am constrained to conclude that it was decided by the spirit and logic of that case that the collection of a public tax as much belongs to the authority of the state as its levy and assessment, and the reasons which forbid a court to supply the latter apply with equal force to the former."

In *Crabtree v. Madden*, 54 Fed. 426, 4 C. C. A. 408, the tax sought to be collected was imposed by the Indian tribes. This court, speaking through Judge Sanborn, after asserting that the authority imposing the tax had equal power to prescribe the remedies and designate the officers to collect it, asserted the proposition that actions at law for the collection of taxes, as a rule, are unauthorized, and that the general rule is that where remedies are provided, and such an action is not named as one of them, a common-law action to recover the tax would not lie, even in the courts of the sovereignty which had imposed them. He further said:

"The counsel for plaintiffs attempts to escape this conclusion by the argument that this tax is a debt; that it arises upon an implied contract; that the court has jurisdiction to enforce such contracts, and hence of this action. This position is not tenable. Taxes are not debts. They do not rest upon contract, express or implied. They are imposed by the legislative authority, without the consent and against the will of the persons taxed, to maintain the government, protect the rights and privileges of its subjects, or to accomplish some authorized special purpose. They do not draw interest, are not subject to set-off, and do not depend for their existence or enforcement upon the individual assent of the taxpayers."

It may be conceded that a tax imposed in favor of the government, whether by assessments or other means, having been ascertained, so as to become fixed either as a lien on specific property or as a claim in personam, no matter what technical name may be given to the suit, the government would be afforded a remedy through its courts for the enforcement of its payment, unless it appears from the statute that in respect of the particular tax it was not contemplated that it should be collected by a suit at law. As a means for the enforcement of the purchase of the tax stamps, which was the only mode of pay-

ment prescribed by the act, the statute subjected the derelict to prosecution as a misdemeanor and to a fine of \$100, and in addition thereto it disentitled the deed to admission of record under the recording statutes of the state and rendered it inadmissible in evidence in the courts. On the face of the act these penalizing provisions were deemed by Congress as far as it cared to go toward the enforcement of the payment of this tax.

It is not persuasive to say that the penalty and disqualifying incidents imposed might not be effective to compel the purchase of a large amount of stamps. While the penal sum imposed as a fine or the imprisonment might not be a sufficient deterrent against evasions of the tax, the scandal of a conviction under indictment or criminal information and the other consequences attached for the nonaffixing of the stamps were most serious. The nonadmission of the deed of conveyance as a muniment of title might be most disastrous to the grantee in the event of the interposition of the creditors of the grantor or subsequent grantees or mortgagees. In the event of a judicial inquiry, where the rights of the grantee were at issue, the inadmissibility of his deed in evidence, for the lack of stamps, might be ruinous to him. It is sufficient, however, to say that Congress in framing the statute deemed the liabilities and disabilities imposed adequate enough to enforce compliance. The judicial branch of the government has no right to challenge the legislative discretion. The established rule of the common law is that where a legislative act creates a new right, or imposes a new burden, and specifies certain remedies in the form of penalties and the like, the prescription is exclusive of any other remedy.

It is a noteworthy fact that in the matter of "Legacies and Distributive Shares of Personal Property" (pages 798, 799, of the act of 1898), where the tax is ascertained from schedules and constitutes a lien upon the decedent's estate, on refusal of the administrator or executor to pay, it is provided that:

"The collector shall commence appropriate proceedings before any court of the United States, in the name of the United States, against such person or persons as may have the actual or constructive custody or possession of such property or personal estate, or any part thereof, and shall subject such property or personal estate, or any portion of the same, to be sold upon the judgment or decree of such court," etc.

No like provision was made in respect of the failure to place upon any written instrument the required stamps.

The contention on behalf of the government is that this suit is maintainable by reason of section 31 of the act, which declares that:

"All administrative, special or stamp provisions of law, including the laws in relation to the assessment of taxes, not heretofore specifically repealed, are hereby made applicable to this act."

In order to make said section effective to the end desired, it is further claimed that it had reference to and incorporated into the statute the provisions of section 9 of the internal revenue act of 1866, authorizing suit by the government to recover taxes (which has hereinbefore been quoted), which now constitutes section 3213, Rev. St

U. S. 1878. This, it must be conceded, would be a remarkable extension of the ordinary import of the terms and words employed in said section 31. It occurs under the heading "Legacies and Distributive Shares of Personal Property," declaring that estates in descent and distribution shall be taxed, and providing the amount and the manner of ascertaining the same. As the stamp tax in respect of deeds of conveyance imposed by the war revenue acts of 1864 and 1866 were repealed by Act June 6, 1872, c. 315, 17 Stat. 256, the term "stamp provisions" could have no reference to provisions pertaining to stamps on deeds of conveyance, for those had been "heretofore specially repealed." But there were "laws in respect to the assessment of taxes" which had not hitherto been repealed, such as inheritance taxes, legacies, and personal property, and assessments on incomes.

The term "special"—that is, special provisions of law—certainly did not point out said section 3213, Rev. St. 1878, *supra*, as that is a general law applicable to all taxes collectible by suit. Its natural import is that it refers to some special provisions of some act which might not have been specified in the particular act. But it can have no reference to provisions respecting the payment of taxes by stamps, as the act of 1898 presents a plenary system, with definite details as to the manner of their payment, and prescribes the remedy for its enforcement.

The only remaining term, therefore, in section 31, upon which the government's contention can be hung, is the word "administrative." The ordinary, common acceptance of this term is that it pertains to matters that are ministerial, administrative, or executive. An assessment might, with admissible propriety, imply a mere ministerial act; but the specification in the section of "laws in relation to the assessment of taxes" clearly enough indicates that in the judgment of Congress the word "administrative" was not sufficient to comprehend an assessment. The omission of the word "collection," which is so closely allied to and usually follows an assessment, would indicate that it was purposely omitted. In any event, the term "collection" is not expressed, and the court has no authority to read it into the statute.

There is another persuasive, if not conclusive, fact that it was not the mind of Congress that a suit could be maintained for the recovery of taxes growing out of a failure to put the required revenue stamps on a deed or other written instrument. Act April 12, 1902, c. 500, § 7, 32 Stat. 97 [U. S. Comp. St. Supp. 1907, p. 646], expressly repeals the act of 1898 requiring deeds of conveyance to be stamped and fixing the amount thereof, and it also expressly repealed section 29 of the act of 1898 respecting legacies and distributive shares of personal property. But this was qualified by the provision (section 8):

"That all taxes or duties imposed by section 29 of the act of June 13, 1898, and amendments thereof prior to the taking effect of this act, shall be subject, as to lien, charge, collection, and otherwise, to the provisions of section 30 of the act of June 13, 1898, and amendments thereof, which are hereby continued in force."

It then recopied said section 30, providing for the manner of assessments and the legal procedure to recover that tax by suit. The failure of Congress to make a like reservation in respect of the en-

forcement of the collection of taxes under the stamp act furnishes, to our minds, an irrefragable argument against the contention of the government.

Suggestive argument is furthermore furnished by reference to other statutes in *pari materia* respecting tax stamps to be placed on certain packages and articles. Take the act imposing a tax upon the sale, etc., of "filled cheese" (Act June 6, 1896, 29 Stat. 255, c. 337 [U. S. Comp. St. 1901, p. 2239]). Section 10 provides that, whenever any manufacturer sells or removes for sale any filled cheese upon which the tax is required to be paid by stamps without paying such tax, it shall be the duty of the Commissioner of Internal Revenue, within a period of not more than two years after such sale or removal, upon satisfactory proof, to estimate the amount of tax which has been omitted to be paid and to make an assessment therefor and certify the same to the collector. "The tax so assessed shall be in addition to the penalties imposed by law for such sale or removal." Section 17 provides:

"That all fines, penalties, and forfeitures imposed by this act may be recovered in any court of competent jurisdiction."

While the act for the enforcement of the payment of this stamp duty provides penalties and forfeitures, in order that that should not be regarded as the only remedy for the enforcement of the tax, the statute expressly declares that the tax shall be in addition to the penalties imposed by law for such failure, and consequently could be recovered by suit under said section 3213, *supra*.

Act June 13, 1898, c. 448, 30 Stat. 448, 468 [U. S. Comp. St. 1901, p. 2286], providing for the payment of taxes on mixed flour, declares that "the tax levied by this section shall be represented by coupon stamps," and that the Commissioner of Internal Revenue, for a period of not more than one year after such sale, consignment, or removal, is to estimate the amount of the tax which should have been paid, make an assessment therefor, and certify the same to the collector of the proper district. "The tax so assessed shall be in addition to the penalties imposed by this act for an unauthorized sale or removal," with a further provision "that all fines, penalties, and forfeitures imposed by the section specified may be recovered in any court of competent jurisdiction."

So Act Aug. 27, 1894, c. 349, 28 Stat. 562 [U. S. Comp. St. 1901, p. 2275], declares that, whenever any article upon which a tax is required to be paid by means of a stamp is sold or removed for sale by the manufacturer thereof without the use of the proper stamp, in addition to the penalties imposed by law for such sale or removal, it shall be the duty of the Commissioner of Internal Revenue, within a period of not more than two years after such sale or removal, to estimate the amount of the tax which has been omitted to be paid, and to make an assessment therefor upon the manufacturer or producer of such article, the amount to be certified to the collector, who shall demand payment of such tax, "and upon the neglect or refusal of payment by such manufacturer or producer, shall proceed to collect the same in the manner provided for the collection of other assessed taxes."

Act Aug. 2, 1886, c. 840, 24 Stat. 210 [U. S. Comp. St. 1901, p. 2230], imposed a tax on the manufacture and sale of oleomargarine. Section 6 of the act provided that:

"Every person who knowingly sells or offers for sale, or delivers or offers to deliver, any oleomargarine in any other form than in new wooden or paper packages as above described, or who packs in any package any oleomargarine in any manner contrary to law, or who falsely brands any package or affixes a stamp on any package denoting a less amount of tax than that required by law, shall be fined for each offense not more than one thousand dollars, and be imprisoned not more than two years."

Section 8, after declaring the amount of tax per pound to be paid by the manufacturer thereof, declares that:

"The tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving, issue, sale, etc., relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section."

And section 9 declares that whenever there shall be a sale "without the use of the proper stamps, it shall be the duty of the Commissioner of Internal Revenue, within a period of not more than two years after such sale," etc., to estimate the amount of the tax which has been omitted to be paid, and to make an assessment therefor and certify the same to the collector, and "the tax so assessed shall be in addition to the penalties imposed by law for such sale or removal." The absence of such a provision in the act of 1898, to the effect that the penalties and forfeitures shall be in addition to the amount of the tax to be paid, in respect of the stamps required to be placed on written instruments and the like, is significant. In respect of the articles above enumerated the assessment of the tax was made upon the thing itself, and created an obligation in personam for the tax after the assessment made by the collector, as provided by the statutes.

There are numerous reported cases under the war revenue tax acts wherein suits were instituted to enforce the collection of taxes under other provisions imposing an assessment upon the thing itself or the fund arising in a particular way. As every lawyer who was in active practice during the period when the stamp acts of 1864 and 1866 were in force will recall, the holders of instruments required by the acts to be stamped met with serious defeats in litigation where the unstamped instruments were rejected in evidence. While some state courts held that the act could not thus determine for the state courts the question of the competency of such instruments as evidence, a great majority of the state courts affirmed the validity of the act in this respect, and the federal courts uniformly enforced it. Notwithstanding the fact that failures in certain instances to place on the designated written instruments the required stamps was brought to public attention, there is not a reported case showing that the government conceived that it had a right of action to recover such tax as a debt. And there is but one reported case under the war revenue tax in question where such right of action has been asserted, and that is the case of *Fleshman v. McClain* (C. C.) 105 Fed. 610. That was a suit instituted against the collector of internal revenue to recover back a tax alleged to have been illegally exacted, growing out of the failure of a stock-

broker to affix revenue stamps to certain memoranda of sales. The Circuit Court overruled a demurrer to the petition, on the distinct ground that as the stamp duty imposed by the statute was collectible through the sale of stamps and in no other prescribed mode, and the statute having prescribed what penalties might be enforced and recovered, attaching other penalizing incidents for failure to affix the stamp, the right to maintain the suit, therefore, could not arise by implication. This ruling was affirmed by the Court of Appeals of the Third Circuit in 106 Fed. 880, 46 C. C. A. 15. While Gray, Circuit Judge, who spoke for the court, held that the tax was not demandable on other grounds as well, he took pains to say that the grounds upon which the court below based its opinion were "equally controlling and decisive of the case in hand," and then proceeded to adopt the opinion of the district judge. He said, *inter alia*:

"Congress possessed the sole power to authorize this tax, and the sole power to prescribe the means by which it should be collected. No remedy by suit is given or implied by the act in question, nor is there to be discovered any authority to demand and accept money in lieu of the stamps that are required by law to be affixed. * * * A penalty for failure to obey this statutory requirement is provided, but I find no other remedy in the act."

It seems to us that a contrary view of the statute in question would be far-reaching in its consequences. There is no limitation imposed by the statute of 1898 limiting such suits, for the sufficient reason that the Congress, in our opinion, never for one moment conceived that the United States afterwards, when all the moneys had been realized under the statute for the exigencies of the war debt, and after it had repealed the statute, zealous inspectors or prowlers through ancient records might discover that some instrument had not been properly stamped, and the courts be flooded with suits for the recovery of the deficiencies. The tax sued for accrued in 1899. Mr. Stratton died in 1901. Under the laws of Colorado claims against estates of decedents are required to be presented for allowance within two years. This suit was not brought until after the lapse of about six years, and after the repeal of the statute and the calling in for cancellation by the Internal Revenue Department of all such stamps. The language of Mr. Justice Bradley, in *Savings Bank v. United States*, *supra*, would have a juster application to the situation of this suit:

"If the matter is left open so that any person or corporation may be prosecuted for taxes at any time, it leaves the citizen exposed to many hazards, and to the mercy of prying informers, when the evidence by which he could have shown his immunity or exemption has perished."

Finding no express authority in the statute for such a proceeding, we are of opinion that the judgment of the district court should be affirmed. It is so ordered.

HOOK, Circuit Judge (dissenting). The question in this case is whether the government is entitled to maintain an action for the recovery of stamp taxes imposed by the war revenue act of 1898. The government contends that it is because (a) the rule of *Savings Bank v. United States*, 19 Wall. 227, 22 L. Ed. 80, still prevails, and (b)

by express provision in the act itself Congress adopted and applied to the taxes therein levied all means of collection then authorized by law, and among them was the remedy of plenary action. I am not persuaded that *Savings Bank v. United States* has been overruled, or that the court's full discussion and decision that a right of action existed independent of statutory provision are obiter dicta. The Supreme Court based its conclusion upon two distinct and independent grounds, either of which was sufficient: First, general principles of law, and particularly those respecting the attributes of sovereignty; and, second, a provision of the statute then in question applying to the particular case. It is manifest that what was said upon either of these cannot be held to be obiter. Any doubt about this would be dispelled by *Union Pacific Co. v. Mason City Co.*, 199 U. S. 166, 26 Sup. Ct. 20, 50 L. Ed. 134, wherein Mr. Justice Brewer said:

"Of course, where there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is obiter; but each is the judgment of the court, and of equal validity with the other."

This language was used in affirmance of our own decision in that case (128 Fed. 230, 64 C. C. A. 348), wherein Judge Sanborn said:

"Where a court places its decision of the ultimate legal issue before it upon its decisions of two legal questions, which were pertinent to the issue, debated at the bar, and considered and determined in the opinion, the decision of either one of which is sufficient to sustain the determination of the ultimate issue, the decision of each of the two questions and of every pertinent legal question decided in reaching either decision has the binding force of an adjudication, and is not a mere obiter dictum."

It is equally clear that *Savings Bank v. United States* has not been overruled by *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197, or its authority impaired by that case, or by the earlier case of *Lane County v. Oregon*, 7 Wall. 71, 19 L. Ed. 101. In the *Lane County Case* it was decided that the statutes of Oregon required certain taxes to be paid in gold and silver coin and that the term "debts" used in the legal tender acts of Congress had no reference to taxes imposed by state authority. Nothing more was decided. In the *Meriwether Case*, which is relied on as a departure from the rule of *Savings Bank v. United States*, the question now before us, namely, whether the government can maintain an action for the recovery of taxes levied by it, did not arise at all, and was not decided. Justice Field did not deliver the opinion of the court. In fact there was no opinion by the court. There was merely a brief statement of legal conclusions upon the facts involved without an expression of the reasons which induced them. Justice Field, on behalf of himself and Justices Miller and Bradley, merely wrote a statement of the reasons which controlled their concurrence. Three other justices, Strong, Swayne, and Harlan, dissented. But, as already observed, the question before us was not there involved. It is a curious fact that Justice Miller, for whom Justice Field spoke in the *Meriwether Case*, delivered the opinion in *United States v. Pacific Railroad*, which I will presently advert to again, in which he held that the government could maintain an action

to recover a tax, and in referring to *Savings Bank v. United States* said:

"In that case the Supreme Court held that for the purposes of that collection and in some senses it was a debt; that the tax—which I presume was the same kind of a tax as this is—could be so collected."

In *Savings Bank v. United States* the court referred to the established practice in England of actions and suits in the nature of debt being maintained by the crown for the recovery of taxes and duties, though such remedies were unauthorized by statute. The court also referred with approval to decisions in this country holding that the government was entitled to such remedy. *United States v. Lyman*, 1 Mason, 482, Fed. Cas. No. 15,647; *Meredith v. United States*, 13 Pet. 486, 10 L. Ed. 258. In the *Lyman Case* will be found an exhaustive discussion of the question by Justice Story and full reference to the English authorities.

The rule of *Savings Bank v. United States* finds abundant support, were any needed, in other decisions of the national courts. In *Stockwell v. United States*, 13 Wall. 531, 20 L. Ed. 491, it was said:

"Debt lies whenever a sum certain is due to the plaintiff or a sum which can readily be reduced to a certainty—a sum requiring no future valuation to settle its amount. It is not necessarily founded upon contract. It is immaterial in what manner the obligation was incurred or by what it is evidenced, if the sum owing is capable of being definitely ascertained."

See, also, *Chaffee v. United States*, 18 Wall. 516, 21 L. Ed. 908.

United States v. Pacific Railroad, 4 Dill. 66, Fed. Cas. No. 15,983, was a suit in equity to recover the amount of taxes claimed to be due from the railroad company under the internal revenue law and to enforce the lien of the taxes upon its property. Mr. Justice Miller, with whom Judge Dillon was associated, said:

"A good deal of argument on both sides has been presented to us upon the question whether an action to recover taxes is an action of debt, and whether an obligation to pay taxes to the government is a debt. * * * In the view that all of us here take I think, however, that this discussion is immaterial. It is immaterial what you call the obligation of a citizen to pay his taxes. It is very clearly an obligation which may be enforced by the courts."

The doctrine of *Savings Bank v. United States* was recognized as controlling by Justice Clifford and the district judge who sat with him in *United States v. Hazard*, Fed. Cas. No. 15,337. In *United States v. Cobb* (C. C.) 11 Fed. 76, it was said that the settled rule that import duties were personal debts of the importer for which action would lie had been applied to the internal revenue acts. In *United States v. Dodge*, 1 Dedy, 124, Fed. Cas. No. 14,973, the *Meredith Case*, supra, is cited as authority for a personal liability of importer and consignee for import duties, and in the *Meredith Case* the liability was sustained upon general principles of law. *United States v. Tilden*, 9 Ben. 368, Fed. Cas. No. 16,519, was an action to recover income taxes; but it involved the questions now before us—whether the remedies specified in the act imposing the tax were exclusive, and whether an action in debt would lie. Judge Blatchford, after an exhaustive discussion of the *Savings Bank Case*, said that it decided every question before

him. He also disposed of the contention that certain portions of the opinion in that case were obiter. *United States v. Washington Mills*, 2 Cliff. 601, Fed. Cas. No. 16,647, was an action to recover a revenue tax under the act of June 30, 1864. Justice Clifford said:

"Objection is also made to the right of the plaintiffs to recover in this case, because it is insisted that the remedy by distraint as given in the act of Congress is the exclusive remedy in the case. * * * Extended argument upon this subject, however, is unnecessary, as the question is regarded as settled by the decisions of the Supreme Court. The same objection was made in the case of *Meredith v. United States*, 13 Pet. (38 U. S.) 493, 10 L. Ed. 258, which was a suit for duties on imports. Duties due upon all goods imported, say the court in that case, constitute a personal debt due to the United States from the importer, independently of any lien on the goods or any bond given for the duties. * * * Assumpsit for taxes imposed under the acts of Congress providing for internal revenue is also the proper form of action."

In *King v. United States*, 99 U. S. 229, 25 L. Ed. 373, a case not involving the question before us, Justice Miller, in speaking for the court, said:

"The court held explicitly (in the *Savings Bank Case*) that the obligation to pay the tax did not depend on an assessment made by any officer whatever, but that, the facts being established on which the tax rested, the law made the assessment, and an action of debt could be maintained to recover it, though no officer had made an assessment."

In *United States v. Erie Railway Co.*, 107 U. S. 2, 2 Sup. Ct. 83, 27 L. Ed. 385, the court adverted to what had been decided in the *Savings Bank Case*, and not with disapproval; also in *United States v. Reading Railroad*, 123 U. S. 113, 8 Sup. Ct. 77, 31 L. Ed. 138, and in *United States v. Snyder*, 149 U. S. 210, 13 Sup. Ct. 846, 37 L. Ed. 705.

There is no decision of the Supreme Court which, when rightly regarded, impairs the controlling authority of *Savings Bank v. United States*. The state courts are in conflict; the majority favoring the contrary doctrine. Judge Dillon, in his work on *Municipal Corporations* (volume 2, § 815), says:

"When the power to levy the tax is plainly given, the right to collect by suit should not be taken to be impliedly denied, unless the intention of the Legislature, that the special mode prescribed should be the only mode, appears with reasonable certainty."

Defendants rely upon *Crabtree v. Madden*, 54 Fed. 426, 4 C. C. A. 408, *McClain v. Fleshman*, 106 Fed. 880, 46 C. C. A. 15, and *Fleshman v. McClain* (C. C.) 105 Fed. 610. In the first of these it is said that taxes are not debts; but it should be observed that the case was an attempt to collect in the courts of one sovereignty taxes levied under the laws of another. The other case was an action to recover from a collector of internal revenue moneys alleged to have been illegally demanded and received by him under claim that they were due by virtue of section 6 of the war revenue act. To secure payment the collector threatened the plaintiff with "proceedings." The Circuit Court and the Court of Appeals of the Third Circuit held that the penalties specifically prescribed in the act were the sole means of enforcing payment and that there was nothing in the act giving or implying author-

ity "to demand and accept money in lieu of the stamps that are required by law to be affixed." The case of *Savings Bank v. United States* was not called to the court's attention, nor was reference made to section 31 of the act.

In both the *Lyman* and *Meredith* Cases, *supra*, holding that duties were recoverable by the government in an action of debt, significance was attached to the employment in the act imposing the duties of the phrase "there shall be levied, collected and paid." The same phrase is found in that part of the war revenue act now under discussion which relates to the documents, instruments, etc., of Schedule A. In other words, Congress enacted that there shall be "levied, collected and paid for and in respect of" those documents and instruments "the several taxes or sums of money set down in figures against the same respectively." I apprehend that it is a matter of no importance at all to the question before us that for convenience in the administration of the law provision was made that the person liable to pay the money was authorized to do so by purchasing, affixing, and canceling stamps. That is an administrative detail quite useful in giving evidence of compliance with the law, but having no bearing upon the inherent nature of the tax or upon the remedies of the government for default in payment. Nor does it signify anything to say that a tax or other due, duty, or obligation is a debt, or that it is not a debt, unless we are given to know the text in which the term "debt" appears. Debt has a range of meaning from the narrowest to the widest, both in the law and out of it. The text determines. Thus, a tax may be a debt within statutes concerning bankruptcy, insolvency, and the administration of estates of deceased persons, and yet not so in those relating to set-off and legal tender. That in a broad sense a tax is a debt has been recognized ever since the days of Blackstone, who said:

"Whatever, therefore, the laws order any one to pay, that becomes instantly a debt which he hath beforehand contracted to discharge." 3 Bl. Com. 158.

Again, I think it is quite clear that actions at law as means of collecting the taxes levied were expressly adopted by the war revenue act. That act imposed increased taxes upon fermented liquors, taxes termed by Congress "special taxes" on the occupations of bankers, brokers, and the like, additional taxes on tobaccos and dealers and manufacturers thereof, taxes in respect of the documents, etc., mentioned in Schedule A, and the medicines, etc., in Schedule B. It also imposed what were termed "excise taxes" on those engaged in refining petroleum and sugar, also taxes on the transmission of legacies and distributive shares of personal property and upon various other subjects of taxation. Section 31 of the act is as follows:

"That all administrative, special or stamp provisions of law, including the laws in relation to the assessment of taxes not heretofore specifically repealed are hereby made applicable to this act."

I think that my associates are in error in saying that this section is under the heading "Legacies and Distributive Shares of Personal Property"; the inference suggested being that the section should be confined in its operation to the subject-matter of that heading. The er-

ror in this seems manifest from the reading of the section itself. By the very terms of section 31 pre-existing provisions of law were made applicable to the entire war revenue act, and not merely to the preceding sections 29 and 30, which deal with legacies and distributive shares of personal property. If this method of construction is applied to other portions of the act, it must with equal reason be said that section 28 comes under the heading "Excise Taxes on Persons, Firms, Companies and Corporations Engaged in Refining Petroleum and Sugar," and is so confined in its operation; yet section 28 merely imposes a tax on every seat sold in a palace or parlor car and every berth sold in a sleeping car. At the time of the passage of this act there had existed for many years a comprehensive scheme for the collection of taxes constituting a machinery thoroughly familiar to the officers charged with its operation and to a great extent illumined by the decisions of the courts and the rulings of administrative officials. Among those provisions is section 3213 of the Revised Statutes, under the title "Internal Revenue," which provides, among other things, that taxes may be sued for and recovered in the name of the United States in any proper form of action before any Circuit or District Court of the United States for the district within which the liability to such tax is incurred or where the tax debtor resides. This provision has been upon the statute books ever since 1866. The revenue act of 1864 (13 Stat. 236, c. 173) levied stamp taxes similar to those of the act now before us. Section 41 authorized actions for the recovery of fines, penalties, and forfeitures prescribed by that act. The act of 1866 (14 Stat. 110, c. 184) left the stamp taxes in force, but amended section 41 so that the right of action extended to fines, penalties, and forfeitures prescribed by any law and also to the taxes themselves. So, as the law stood in 1866, there were stamp taxes like that in the case before us, and the government might sue for their recovery. Some years afterwards the sections imposing the stamp taxes were repealed, but the remedy applicable to all taxes has remained to this day. Then in 1898 the war revenue act restored the stamp taxes. Can there be much doubt that without express provision the old general remedy for the recovery of all taxes applied to those imposed by the new act? Can there be any doubt whatever that to make the matter certain Congress inserted section 31?

When the bill that became the war revenue act was called up for consideration in the House of Representatives April 27, 1898, Mr. Dingley, who had charge of it, said, in explaining its scope and purport, that they had restored the adhesive stamp tax which existed from 1864 to 1872, placing it in large part on the basis of the old law as it stood in 1866, with certain additions (31 Cong. Rec. part 5, p. 4298). It seems to me altogether clear that by section 31 it was the intention of Congress to expressly adopt this old provision as part of the machinery for the enforcement of the taxes then levied. It made applicable to the act all "administrative provisions of law," and if section 3213, Rev. St., is not an administrative provision, what is it? When we speak of laws relating to the administration of estates, we include laws prescribing the methods and remedies for the collection of the as-

sets and their distribution and the powers of officers in connection therewith. When we speak of administrative provisions of law in respect of taxes, I think we naturally include all those granting powers to executive officials and providing ways and means for collection. That this result was in the mind of Congress I have little doubt. Mr. Dingley also said in explaining the general scope of the bill:

"These taxes have been selected, first, because we have the machinery for the collection of them now, and they can be collected with but slight additions to the force and with but slight increase of expense. We have selected them, also, because they were a source of revenue successfully seized upon during the Civil War," etc. 31 Cong. Rec. p. 4297.

These same ideas were repeated during the progress of the bill until it finally was enacted into law. I am unable to see why the repeal in 1902 of the provisions imposing taxes on the transmission of legacies and inheritances and the retention of the machinery for the collection of those already accrued is of significance in this case. The liability for accrued taxes in respect of conveyances still remained, and so did section 31 of the act, and also section 3213 of the Revised Statutes of 1878. Those sections were not repealed. Nor can I perceive any relevancy in other acts of Congress which provide that the taxes imposed should be in addition to fines, penalties, and forfeitures prescribed for violation of particular commands of those acts, unless it is claimed that the absence of such provision in respect of the stamp taxes of the war revenue act is an argument that Congress intended that the payment of a fine under that act should operate as a payment of the tax and a release from further liability. I think that a statement of this argument is its refutation. No imprisonment was prescribed in the war revenue act for failure to stamp, except when accompanied by an intent to evade the provisions of the act. No such intent is charged in this case. That some states deny the power of Congress to disqualify an unstamped instrument as evidence was known when the act was passed, and the inefficacy of such a disqualification as a coercive means was apparent.

So much for the "fines, penalties and forfeitures" which it is claimed constitute the sole means of insuring payment of these taxes. It would be strange that Congress should so intend when it was endeavoring to provide the government with means vitally necessary for the conduct of a war—that it should not give the government the simple remedies which every individual has for the collection of a debt. If Congress has power to enact that a tax shall be levied, collected, and paid, and it does so enact, there is nothing so unusual or oppressive in an action for the recovery of the tax that such remedy should be denied, and it should not be denied, unless it is evident that it was the legislative intent to limit the means of enforcement to the penal provisions of the act.

(156 Fed. 897.)

THOMAS v. UNITED STATES.

TAGGART v. SAME.

(Circuit Court of Appeals, Eighth Circuit. October 21, 1907.)

Nos. 2,485, 2,486.

1. STATUTES—RULES OF CONSTRUCTION—COMPILATIONS.

In cases of doubt and uncertainty as to the meaning of a compiled or revised statute, resort may properly be had to the original enactments.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 312.]

2. CONSPIRACY—FEDERAL STATUTE—CONSTRUCTION.

In Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], relating to conspiracies, the words "offenses against the United States" have the same meaning as the words "offenses against the laws of the United States" in the original act of March 2, 1867 (14 Stat. 484, c. 169) the change being merely one of phraseology made by the revision commission, and such section denounces conspiracies to commit offenses created by any of the statutes of the United States.

3. SAME.

A defendant may be prosecuted under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], for a conspiracy to violate a criminal or penal statute of the United States, notwithstanding the fact that the punishment prescribed for the offense created by such statute is less than that prescribed for conspiracy; the conspiracy in itself being a distinct and substantive offense.

4. SAME—CONSPIRACY TO VIOLATE INTERSTATE COMMERCE ACT—GIVING OR RECEIVING REBATES.

A conspiracy to induce the giving or receiving of rebates in violation of the Elkins act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880]), is punishable under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], where the persons charged are not limited to the giver and receiver of the rebate alone.

5. SAME—INDICTMENT—DESCRIPTION OF OFFENSE.

In an indictment under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], for a conspiracy to commit an offense against the United States, all facts necessary to constitute the conspiracy, including the overt act, must be averred with all the particularity required in criminal pleadings, but no high degree of particularity is required in describing the offense to which the conspiracy relates which is necessarily defined by the statute. So, where an indictment charged a conspiracy to induce a shipper to receive rebates from railroad companies in violation of the federal statute, it was not essential to aver the names of such railroad companies which were not known to the grand jury.

6. CRIMINAL LAW—EVIDENCE—ACTS OF CO-CONSPIRATORS.

On the trial of defendants charged with having conspired with a person named and with others to the grand jurors unknown to induce a partnership to accept rebates from railroad companies on shipments in violation of the interstate commerce law, where there was evidence tending to establish the conspiracy, and that the arrangement for the illegal rebates was made between defendants and one member of such partnership, entries in a private memorandum book kept by such partner, showing sums received as "freight commissions" and distributed between the partners individually, which transactions did not appear on the books of the firm, were admissible in evidence.

[Ed. Note.—Admissibility on trial of joint indictments of acts and declarations of conspirators and codefendants after accomplishment of object, see note to *Sorenson v. United States*, 74 C. C. A. 472.]

7. SAME—PROOF OF INTENT—SIMILAR TRANSACTIONS.

On such trial also evidence of contemporaneous contracts made by defendants with other large shippers, similar in all respects to that made with the partnership named, and that such shippers also received sums of money indirectly which they understood to come from defendants, and to be in fact rebates, was admissible on the question of intent and motive in the transaction charged in the indictment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 830-834.]

8. CONSPIRACY—ELEMENTS OF OFFENSE.

One who comes into a conspiracy after it has been formed, with knowledge of its existence, and with a purpose of forwarding its designs, is equally as guilty as though he had participated in its original formation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, § 76.]

9. CRIMINAL LAW—FORMER JEOPARDY—IDENTITY OF OFFENSES.

The acquittal of defendants on one of two indictments consolidated for the purpose of trial is not a bar to a conviction on the other where the offenses charged are distinct in point of law, although the same facts may have been relied on to a great extent in each case.

10. SAME—TRIAL—INSTRUCTIONS.

In a criminal case, the refusal of a requested instruction that defendant is presumed innocent, and that such presumption remains until overcome by the proof, is reversible error, notwithstanding the giving of a proper instruction on the subject of reasonable doubt.

In Error to the District Court of the United States for the Western District of Missouri.

See 145 Fed. 74.

Hale Holden, H. C. Timmonds, and John N. Baldwin (O. M. Spencer, O. H. Dean, and W. D. McLeod, on the brief), for plaintiffs in error.

A. S. Van Valkenburgh, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. An indictment was found in the court below charging defendants Thomas and Taggart with conspiring with one George A. Barton, a member of the firm of Barton Bros., of Kansas City, Mo., and others to the grand jurors unknown, to commit an offense against the United States by getting that firm, which was engaged in the business of making large shipments of merchandise from New York and New Jersey to Kansas City, Mo., to accept and receive rebates and concessions from divers railroads engaged in transportation of interstate commerce between those places, in violation of the interstate commerce acts, and particularly Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880], known as the "Elkins Act." Another indictment was found in the same court and at the same time against Thomas and Taggart and one Crosby, charging them with conspiring to commit an offense against the United States by getting the Chicago, Burlington & Quincy Railroad Company, a corporation operating a railroad engaged in the transportation of interstate commerce, to offer, grant, and give rebates, concessions, and discriminations to divers favored persons and corporations engaged in interstate commerce, and particularly to such persons or corporations in Kansas City as were engaged in shipping goods from New

York or New Jersey to Kansas City. The two indictments were consolidated for the purpose of a trial. The defendants were found guilty and sentenced to pay a fine and be imprisoned on the first, and with Crosby were found not guilty and discharged on the second, indictment. Thomas and Taggart prosecuted separate writs of error, which were treated together in argument and brief of their respective counsel, and will be treated together in this opinion.

A large number of errors were originally assigned, but in conforming to the requirements of rule 24 of this court (150 Fed. xxxiii), requiring counsel to specify in their briefs the errors intended to be relied upon by them, they are greatly reduced, and will be specifically referred to as the opinion proceeds. Many of the errors claimed to have been committed by the trial court arise under the general specification that the court erred in not sustaining a demurrer to the indictment. Section 5440 of the Revised Statutes [U. S. Comp. St. 1901, p. 3676], under which the indictments were found, originated as section 30 of an act entitled "An act to amend existing laws relating to internal revenue and for other purposes," approved March 2, 1867 (14 Stat. 471, 484, c. 169), which is as follows:

"That if two or more persons conspire either to commit any offense against the laws of the United States or to defraud the United States in any manner whatsoever and one or more of said parties to said conspiracy shall do any act to effect the object thereof, the parties to said conspiracy shall be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars and to imprisonment not exceeding two years. * * *

Under authority of an act approved June 27, 1866 (14 Stat. 74, c. 140), a commission was appointed to revise and consolidate the statute laws of the United States, and empowered to "make such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text." That commission was not authorized to make any changes in the law as it stood, but only to alter the existing text so far as necessary to make clear the intention of Congress whenever that intention was found obscured by contradictions, imperfections, or omissions. The commission reported in 1873, taking the conspiracy provision out of the special class of revenue legislation, and placing it under a heading, "Crimes Against the Operations of the Government," as an independent section (5440) of the Revision. It changed the text so that, instead of reading, "If two or more persons conspire either to commit any offense against the laws of the United States or to defraud the United States in any manner whatsoever" etc., it read:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose and one or more of such parties do any act to effect the object of the conspiracy all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars and to imprisonment not more than two years."

By an act approved May 17, 1879 (21 Stat. 4, c. 8 [U. S. Comp. St. 1901, p. 3676]), section 5440 was amended so as to provide for a fine of not more than \$10,000 or imprisonment for not more than two

years, or both, in the discretion of the court, in lieu of the cumulative punishment provided for in the original section. Except for these modifications of the punishment section 5440 remains as when first incorporated into the revision as a separate section.

1. It was formerly contended that the statute, by reason of its enactment in and as a part of the revenue act, contemplated only conspiracies against the enforcement of the revenue laws of the United States (*United States v. Fehrenbach*, 2 Woods 175, Fed. Cas. No. 15,083), but since the decision of the Supreme Court in *United States v. Hirsch*, 100 U. S. 33, 36, 25 L. Ed. 539, no such contention can longer be made. Counsel for defendants practically so concede, but place reliance upon the proposition that the only conspiracies contemplated by the statute are those against the United States as such, which affect the operations of the government or tend to overthrow or impair its authority, and that it does not contemplate a conspiracy to violate simple penal provisions like those of the Elkins act against giving or receiving rebates. The case of *Curley v. United States*, 64 C. C. A. 369, 130 Fed. 1, is cited and relied upon by them as authority for their contention. That case mainly involves the consideration of a conspiracy to defraud the United States, and many of the expressions quoted and relied upon by counsel must be referred to the conspiracy under actual consideration by the court, namely, a conspiracy to defraud, for an accurate understanding of their meaning. As indicative that the learned court which decided that case did not intend the language to be construed as limiting conspiracies to commit an offense as claimed by the defendants, attention may be called to the following expression found on page 8 of the opinion:

"Manifestly section 5440 in its general terms contemplates wrongs other and beyond conspiracies to commit distinct statutory offenses against the United States. * * *"

If we are wrong in our interpretation of that case, and if it is, when properly understood, authority for defendants' contention now being considered, we find ourselves quite unable to adopt its conclusion. The original conspiracy act of 1867 (14 Stat. 471) made no such limitation. It denounced a conspiracy to commit an offense "against the laws of the United States" as a crime. We cannot presume that the commissioners under the act of 1866 undertook to change the meaning of the original act. They were authorized to make clear the intention of Congress, and they did it in the particular under consideration by expressing the thought that the offense denounced by the original act was one against the organized body capable of being offended, a body authorized to make rules of conduct rather than against the rules themselves. The word "offense" implies a violation of a law by which alone it can be denounced. Actuated doubtless by considerations like these, the commissioners eliminated the words "the laws of," and made the crime denounced to consist of a conspiracy to commit an offense against the United States, the maker of the laws and the body interested in and responsible for their enforcement, and in so doing they expressed more philosophically and exactly the necessary and essential meaning of the original act. In cases of doubt and uncertainty

about the meaning of a compiled or revised statute, resort may properly be had to the original enactments to ascertain their true meaning. *United States v. Bowen*, 100 U. S. 508, 513, 25 L. Ed. 631; *United States v. Lacher*, 134 U. S. 624, 10 Sup. Ct. 625, 33 L. Ed. 1080; *Logan v. United States*, 144 U. S. 263, 302, 12 Sup. Ct. 617, 36 L. Ed. 429; *The Conqueror*, 166 U. S. 110, 122, 17 Sup. Ct. 510, 41 L. Ed. 937; *Barrett v. United States*, 169 U. S. 218, 227, 18 Sup. Ct. 327, 42 L. Ed. 723.

A brief reference to other provisions of the statutes shows that Congress frequently employed the formula "offense against the United States," as the equivalent of "offense against the laws of the United States." Section 1014, Rev. St. [U. S. Comp. St. 1901, p. 716], providing for the arrest, imprisonment, and letting to bail of accused persons reads as follows:

"For any crime or offense against the United States the offender may," etc.

Section 731, relating to the venue in criminal cases, reads:

"When any offense against the United States is begun in one judicial circuit and completed in another it shall be deemed," etc.

Section 5541, relating to the place of imprisonment of convicts, reads:

"In every case where any person convicted of any offense against the United States is sentenced to imprisonment for a period longer than one year, the court by which the sentence is passed," etc.

Section 5542, relating to the same subject, reads:

"In every case where any criminal convicted of any offense against the United States is sentenced to imprisonment and confinement to hard labor it shall be lawful," etc.

Section 5543, relating to the same subject, reads:

"All prisoners who have been or may be convicted of any offense against the laws of the United States * * * shall be entitled," etc.

Many other statutes might be referred to, but the foregoing are sufficient to show that Congress is in the habit of using the formula "offense against the United States" interchangeably and indiscriminately with "offense against the laws of the United States," and that both mean the same thing. It is inconceivable, and, so far as we know, has never been claimed that Congress intended by section 1014 to make provision for the arrest, imprisonment, and bailing of persons charged with offenses affecting the operations of the government only, or that by section 731 Congress did not intend to make all offenses, whatever their grade, begun in one circuit and completed in another triable in either, or that Congress did not intend by sections 5541, 5542, and 5543 to make general provisions for the place of imprisonment and credit for good behavior applicable to all convicts whatever be the character of their offenses.

In the light of the foregoing considerations, we think section 5440 was intended as a broad and comprehensive provision denouncing conspiracies to commit offenses created by any of the statutes of the United States as a crime.

2. Before the passage of the Elkins act in 1903, the interstate commerce law dealt mainly with the carrier, its officers, and agents. The act of 1903 first made it an offense for a shipper to solicit, accept, or receive a rebate, concession, or discrimination. It abolished imprisonment for offenses under the old acts, and did not impose it as punishment for offenses under the new act. In view of this state of the law, it is contended by defendants' counsel that, as the crime of conspiracy under section 5440 is punishable by imprisonment, no such crime can be imputed to one who conspires to violate the interstate commerce act for which no punishment by imprisonment is provided, because that would indirectly operate to subject him to punishment not warranted by law. In other words, that section 5440, in so far as it formerly permitted an indictment for a conspiracy to violate any of the provisions of the interstate commerce act, was to that extent superseded by the Elkins act. This contention might be tenable if the two statutes created or punished the same offense; but the conspiracy statute denounces a crime of different elements and of different gravity than those denounced by either the original or amended interstate commerce acts. In the former, two or more persons must necessarily be implicated, a conspiracy between them must be shown, an overt act in the accomplishment of the object of the conspiracy must be committed, and the offense by reason of the danger that is enhanced by combination and secrecy is peculiarly grave and serious. In the latter acts the mere conscious, intelligent giving, or receiving a rebate, concession, or discrimination and nothing more constitutes a separate offense by the persons so giving or receiving the same. Congress undoubtedly had the power to denounce only the completed act as an offense and to withdraw it from the class of offenses subject to the general conspiracy act, but it would seem, considering the radical difference between a substantive offense denounced by law and a conspiracy to commit such an offense, that, if Congress had intended that offenses against the interstate commerce act should not continue to be the basis of a conspiracy charge, it would have said so in some clear and unambiguous way, and would not have left a matter so important to the offender and to the government to the uncertain test of repeal by implication. By repeated adjudications of the Supreme Court and other courts a conspiracy to commit a criminal offense has been held to be an entirely different thing from the substantive offense itself, and prosecutions for conspiracies to defeat the provisions of the interstate commerce act have been frequently upheld.

In *Clune v. United States*, 159 U. S. 590, 595, 16 Sup. Ct. 125, 40 L. Ed. 269, Mr. Justice Brewer speaking for the Supreme Court in expounding the meaning of section 5440 in connection with section 3995, said:

"[It is] contended that a conspiracy to commit an offense cannot be punished more severely than the offense itself, and also that when the principal offense is, in fact, committed, the mere conspiracy is merged in it. The language of the sections is plain, and not open to doubt. A conspiracy to commit an offense is denounced as itself a separate offense and the punishment therefor fixed by the statute, and we know of no lack of power in Congress to thus deal with a conspiracy. Whatever may be thought of the wisdom or pro-

priety of a statute making a conspiracy to do an act punishable more severely than the doing of the act itself, it is a matter to be considered solely by the legislative body. *Callan v. Wilson*, 127 U. S. 540, 555, 8 Sup. Ct. 1301, 32 L. Ed. 223. The power exists to separate the conspiracy from the act itself and to affix distinct and independent penalties to each."

See, also, *United States v. Hirsch*, *supra*; *United States v. Britton*, 108 U. S. 199, 2 Sup. Ct. 525, 27 L. Ed. 703.

In the following cases persons conspiring to defeat the provisions of the interstate commerce law have been held amenable to the conspiracy statute: *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.* (C. C.) 54 Fed. 730, 19 L. R. A. 387; *Waterhouse v. Comer* (C. C.) 55 Fed. 149, 19 L. R. A. 403; *United States v. Howell* (D. C.) 56 Fed. 21; *United States v. Cassidy* (D. C.) 67 Fed. 698; *Wabash R. Co. v. Hannahan* (C. C.) 121 Fed. 563. In the light of these authoritative decisions denouncing a conspiracy to commit an offense as peculiarly dangerous and in itself totally separate from those involved in the mere violations of the law and of the other decisions referred to, recognizing violations of the interstate commerce law as bases of charges of conspiracy, it would be highly unreasonable to impute to Congress a purpose not to recognize the doctrine of these cases, and by silence merely to deny the applicability of section 5440 to violations of an important act like the interstate commerce law; and we unhesitatingly conclude that, notwithstanding the offense of violating provisions of the interstate commerce law is punishable with less severity than the conspiracy to commit that offense, section 5440 is in no way repealed or superseded by the provisions of the interstate commerce law in question. The two may well and harmoniously stand together, and in such circumstances repeal by implication or supersession of either cannot be presumed. *Great Northern Railway Co. v. United States*, 155 Fed. 945, 84 C. C. A. 93.

3. Again, it is argued that an indictment will not lie in this case for a conspiracy because a concert and plurality of agents are necessary elements of the substantive offense for the commission of which a conspiracy is charged to have been formed; and because it required the intelligent co-operation of two or more persons to commit the offense of receiving a rebate, the giver or givers, on the one hand, and the receiver or receivers, on the other, that every element of the offense of conspiracy is involved in the completed offense of receiving a rebate from the one who gave it and is merged in it. Attention is directed to 2 Wharton's *Crim. Law*, § 1339, *United States v. Dietrich* (C. C.) 126 Fed. 664, and *United States v. New York Cent. & H. R. R. Co.* (C. C.) 146 Fed. 298, as authority for the contention. The rule broadly laid down by Wharton if applied as written justifies the contention made. He says:

"When to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained," etc.

It is to be noted that the learned author fails to state or make it clearly appear whether he limits immunity from the charge of conspiracy to those who are the sole and necessary actors in the com-

mission of the substantive offense, or whether he includes in his rule of immunity conspiracies against persons who may have conspired to induce others to commit the offense. If he limits the applicability of his doctrine to the former, he would be clearly right. It cannot be if (using one of his illustrations) the crime of bigamy be punishable in a certain way that the two parties who alone could commit it can be subjected to a charge of conspiracy for committing the same crime, and thereby made to suffer twice for exactly the same offense, or be subjected to a severer punishment on a conviction for the conspiracy than is imposed upon the substantive offense itself. But, if persons combine to induce others to commit bigamy, they, according to the same learned author, may be punished as for a conspiracy. We think counsel for defendants have erroneously interpreted Wharton's meaning as manifest from the context. As we understand the Dietrich and the New York Central Railroad Cases, they each involve facts of the kind just referred to in the illustration. In the former case Dietrich alone was to receive a bribe and Fisher alone was to give it to him. The conspiracy charged consisted of the unlawful combination between the two to that effect. The indictment being against those two persons alone was held bad. To show that Judge Van Devanter understood the Wharton rule to be limited to cases in which the necessary parties to the substantive offense only were charged with conspiring, a brief quotation from his opinion will suffice. He said (page 666 of 126 Fed.) :

"As the transaction is stated in the indictment, it was Dietrich who agreed to receive the bribe, not Dietrich and Fisher, and it was Fisher who agreed to give the bribe, not Fisher and Dietrich. The charge is not that two or more persons agreed among themselves to corruptly obtain the aid of another, a member of Congress, in securing the appointment of some aspirant to a federal office, nor is it that two or more members of Congress agreed among themselves to obtain from another person a reward or compensation for their services or aid in securing such an appointment. Such an agreement would constitute a conspiracy to commit an offense against the United States, and, if followed by the doing of any act by one of the conspirators to effect its object, would be punishable under section 5440."

In the New York Central Railroad Case the court was dealing with facts like those in the Dietrich Case. The crime charged was a conspiracy to commit the offense of receiving a rebate, and the only persons indicated for the conspiracy were those representing on the one hand the giver and on the other hand the receiver of the rebate, and those were the sole persons whose concert and co-action constituted the substantive offense denounced by the interstate commerce law. That Judge Holt who sat in the case so regarded it a brief extract from his opinion will show. He said (page 304 of 146 Fed.) :

"The counsel for the government assert that the Dietrich Case is to be distinguished from this case because in the Dietrich Case but two persons, the giver and taker of the bribe, were charged with the conspiracy in the indictment, while in the case at bar the indictment charges that seven persons named, and others to the jurors unknown, were parties to the conspiracy. But only four of the seven persons named are indicted, and of those four Guilford and Pomeroy represent simply the giver, and Edgar and Earle simply the receiver of the rebate."

The case now before us differs radically from either of the foregoing. Thomas and Taggart, who are the sole defendants and who alone are indicted, were neither givers nor receivers of the unlawful rebates in question. Neither did they stand for them as representatives. They occupied the position of irresponsible intermediaries. They are neither charged nor shown in proof to have given or received the rebate in question, nor are they charged with conspiring to give or receive a rebate. They are charged with conspiring to bring about the commission of the offense of receiving rebates by others, namely, by Barton Bros. If, when the co-action of two or more persons is necessary to constitute the commission of a crime, no outside persons, however effectually and wickedly they may have conspired with them or either of them to bring about the violation of the law, can be held for a conspiracy, immunity from a most salutary criminal provision is found for many of the worst violators of the law. It is the schemers who set afoot the infractions of the law that are most dangerous to the public weal, and we cannot believe that Congress ever intended, except in cases of a clear doubling of punishment of the same persons for the same offense, to relieve them from amenability to the conspiracy statute.

4. The indictment is also assailed (1) for insufficiency in averment of facts constituting the conspiracy; (2) for want of such certainty in describing the offense which the conspiracy was formed to commit as makes it appear that it was an offense against the United States; (3) for want of such certainty in describing the offense as fairly informs the defendants of its nature and of what they were called upon to meet; (4) for duplicity. The indictment charges in clear and unequivocal language that defendants conspired together and with George A. Barton, one of the members of the firm of Barton Bros., of Kansas City, to commit an offense specifically denounced by the interstate commerce law of getting the firm of Barton Bros., who were large shippers of interstate commerce from New York to Kansas City, to accept and receive rebates as defined in that law from railroads over which their freight might be routed from New York to Kansas City. The indictment charges with great particularity the different steps taken in the formation of the conspiracy, and that its object was to bring about the commission of that offense. It is averred that Thomas, who was then operating a transportation bureau in New York City routing shipments and procuring freight rates for those who might employ him (defendant Taggart being in his employ), should first enter into a contract with Barton Bros. securing the right to place or route all their west-bound freight from New York or New Jersey to Kansas City over such railroads as he might select, and should make an arrangement with divers railroad companies engaged in transportation of interstate commerce freight between New York and Kansas City and other railroad companies to the grand jurors unknown for the carriage of their freight from New York to Kansas City, and should secure from such companies, "in the way of pretended claims, commissions, and allowances," large sums of money to be used in part in making payments of rebates to Barton Bros., thereby lessening their freight rate below that es-

tablished and fixed for the time being according to law, and from time to time to pay the same to Barton Bros. as such rebates and concessions. Little, if any, claim is or can be made that the charge of conspiracy is not well and sufficiently laid, but it is urged that the indictment is bad because it does not set out with sufficient clearness the facts constituting the offense to commit which the conspiracy was formed, and particularly that there is no allegation as to what railroad company, if any, was a party to the conspiracy, or that any railroad company had agreed or promised to give Barton Bros. any rebates or that it knew, or understood it had done so. To properly weigh this argument it should be borne in mind that the particular conspiracy charged to have been formed by defendants was to get Barton Bros. to accept and receive rebates, and thereby to violate a criminal statute. The acceptance of secret rebates by one shipper gives him an undue advantage in business and stands in the way of fair, open, and equal competition, which it is the beneficent design of the interstate commerce act to promote. The conspiracy under consideration was to defeat that design by getting Barton Bros. to receive rebates, and not by getting carriers to give them. But it is said that the receipt of a rebate necessarily implies a giver, and that to properly advise the defendants of the crime charged against them the name of the proposed giver should have been stated and the fact made to appear that they were to act knowingly and intentionally in doing so. In other words, the contention is that facts should be averred with such accuracy as would show, not only an intention to commit the substantive crime, but all facts necessary to constitute that crime. We think that is not the law. All facts necessary to constitute the conspiracy, including the overt act, must be averred with all the particularity required in criminal pleadings because the conspiracy is the crime with which the defendants stand charged, and with the nature and character of which they, under constitutional safeguard, are entitled to be advised. But, when the conspiracy charged is one to commit an offense, and that offense (as is the case in all offenses against the United States) is clearly defined by statute, no high degree of particularity is required in describing it. If enough is shown to make it appear that an offense against the United States has been committed, it is sufficient.

Wharton says (2 Wharton's Crim. Law, § 1343):

"It is enough to set out the offense aimed at by such apt words as will describe it as a conclusion of law."

In *State v. Ripley*, 31 Me. 386, it is said:

"In an indictment for a conspiracy at common law, if the conspiracy charged is an unlawful combination and agreement of two or more persons to commit a deed which if done would be an offense well known and acknowledged, the nature of which is perfectly understood by the name by which it is designated, no further description of the crime is required."

In *State v. Noyes*, 25 Vt. 415, it is held:

"As the object of the conspiracy was to commit an offense punishable by law, it was not necessary to set out the means to be used to effect it; and it is not necessary that there should be the same certainty in setting out the

object of the conspiracy as there must be in an indictment for the offense which the respondents conspired to commit."

In *State v. Grant*, 86 Iowa, 216, 53 N. W. 120, the Supreme Court of Iowa uses the following language:

"It is said that the indictment is defective, in that it fails to fully disclose the means by which the crime was to be accomplished. It is well settled in this state, and is the law in many states, that, where the indictment charges a conspiracy to do an act which is a crime, it is sufficient if it be described by the proper name or terms by which it is generally known in law. It is only where the charge is that an act in itself not criminal is sought to be accomplished in an illegal manner, or by illegal means, that the means used for its accomplishment must be averred."

In *Ching v. United States*, 55 C. C. A. 304, 118 Fed. 538, 540, the Circuit Court of Appeals for the Fourth Circuit in discussing this subject said:

"As to the sufficiency of the indictment, it must be first noted that the gist of the offense charged is that of conspiracy, which we think is properly pleaded. In such cases the offense which is intended to be committed as the result of the conspiracy need not be described as fully as would be required in an indictment in which such matter was charged as a substantive crime."

See, also, *United States v. Stevens* (D. C.) 44 Fed. 132, 141.

Measured by these rules of pleading, the indictment abundantly shows that the conspiracy had for its object the commission of a well-known criminal offense against the United States; that, in the absence of definite knowledge, a sufficient description of the railroads which were to be involved in the execution of the conspiracy is given, and that the defendants were sufficiently informed of the nature and character of the offense with which they were charged. The offense was one clearly denounced in the Elkins act, and sufficiently described in the indictment. The railroads involved were not known to the grand jury, but were described as those which, with their connecting lines, were engaged in carrying interstate commerce from New York to Kansas City, and were the ones which defendants were to designate and determine by exercising the power given them by Barton Bros. to route their freight. Besides definitely averring that the conspiracy was to bring about the commission of a well-known criminal offense, the indictment adds by way of showing more particularly the nature and character of the offense, and the means to be resorted to for its commission, that the money was to be demanded, solicited, and received from the railroads so to be determined by the defendants "in the way or guise of pretended claims, commissions, and allowances," and, when so received, was to be paid over to Barton Bros. as rebates. The words just quoted found in the indictment are general, but, if they "make clear to common understanding" the matter to which they refer, it is sufficient. *Evans v. United States*, 153 U. S. 584, 592, 14 Sup. Ct. 934, 38 L. Ed. 830. To get money from the railroads "in the way or in the guise of pretended claims, commissions and allowances" plainly suggests to the "common understanding" that some subterfuge was to be practiced not to get the money, but to make the money apparently appropriated for one purpose intentionally serve another.

In the recent case of *Armour Packing Co. v. United States*, 82 C. C. A. 135, 153 Fed. 1, we held, that:

"The substance of the crime of receiving a rebate or concession under the Elkins act is the solicitation, acceptance, or receipt thereof whereby property in interstate or foreign commerce is transported at less than the regular rate. The device whereby the receipt and transportation are obtained is not an essential element of the crime and it is unnecessary to plead it in the indictment."

Much more is it true that in a charge of conspiracy to bring about the receipt of a rebate or concession the particular device or method by which it is to be accomplished need not be pleaded with all the particularity which would be required in pleading the commission of the substantive offense.

The contention that the indictment is bad for duplicity because it contains the charge that defendants conspired to commit the offense of getting Barton Bros. "*to accept and receive*" rebates, etc., is without merit. The words underscored are obviously used to express one and the same act, and the fact that the pleader employed them conjointly is not objectionable. It results that the various objections to the indictment for insufficiency are not well taken.

5. Was there error in the introduction of evidence? Without intending to deal with the facts in detail or to make a demonstration from the record of what we have concluded, we content ourselves by stating the result of a patient and careful examination of all the proof. It is the theory of the government, and there is ample evidence tending to show, that some time before November 14, 1903, Thomas, who resided in New York, went to Kansas City and there made arrangements orally with Kimber L. Barton, senior member of the firm of Barton Bros., for the purpose, which subsequent evidence tended to show, of securing rebates from the fixed and lawful tariff rates from New York to Kansas City for Barton Bros., and after securing them to pay the same over to Barton Bros. as unlawful concessions in their favor.

The others members of the firm, William and George A. Barton, if not shown to have been actually cognizant of the arrangement made by Kimber L. at the time it was made, afterwards knowingly participated in the fruits of that arrangement, and fully ratified all that was done by the senior member. On November 14th a contract was executed between Thomas and Barton Bros. This was fair and lawful on its face. It purported to obligate Barton Bros. to give Thomas the exclusive right to route all of their west-bound freight from New York, and to give him a certain minimum amount for his services in so doing, and obligated Thomas, among other things, to collect from the carrier any claims for loss and damage to merchandise and overcharges which Barton Bros. might have. The term of this contract was to expire in January, 1905, and on January 10th of that year another formal contract purporting to obligate the parties to the performance of the same obligations for another year was executed between them. There is evidence tending to show that these contracts did not express the real purpose of the parties, but were subterfuges intended by them to conceal and mystify their real purpose, and to make evi-

dence against the time of possible need. The then recent enactment of the Elkins law, approved February 19, 1903 (32 Stat. 847, c. 708), had for the first time made the receiving of rebates by a shipper a criminal act, and had rendered any direct contract between the carrier and shipper providing for the giving or receiving of an unlawful rebate exceedingly hazardous. Hence the occasion and supposed prudence of operating, if at all, through the medium of an intermediary who should be neither carrier nor shipper, nor subject to the penalties for the misdeeds of either under the interstate commerce law.

With the foregoing scheme claimed by the government to have existed between Thomas and Barton Bros. in mind, we proceed to a consideration of the errors assigned in the introduction of evidence. During the two years in question the firm of Barton Bros. received from the carriers at the hands of Thomas about \$3,900 on legitimate claims for loss, damage, and overcharge, and in addition the individual members received each one-third of \$10,300 from some source and on some account. These facts are undisputed. With a view of getting at the source of and reason for these individual receipts, George A. Barton, one of the partners, who was called as a witness by the government, was asked whether any of this money came from Thomas. He answered "No." He was then asked if it was received from anybody else acting for Thomas. After objections and rulings by the court, the witness answered and the testimony proceeded as follows:

"A. Our firm has received money from sources. Shall I state from whom?

"Q. Certainly. A. I think we received remittances from Mr. Kelby. [Kelby was clerk for Thomas.]

"Q. Do you mean by his hand or through him? A. We received remittances by express and through the mail, and I think Mr. Kelby was here once and left a draft. * * *

"Q. Now, what were those remittances? In what form and in what amount and on what dates? A. Well, I have a record book made up by K. L. Barton of our firm, memoranda that he handed to me. They are not on our regular books. * * *

"Q. Have you that record with you? A. Yes, sir.

"Q. You may state what that book shows with reference to these payments."

To this question the defendants objected, and, upon the objection being overruled, duly excepted. The contents of the book read in evidence showed that from time to time during the year 1904 amounts were received under a notation of "freight commissions" aggregating about \$8,000 and in the year 1905 aggregating about \$2,300. The proof showed that the money so entered in the private book by the senior member of the firm was equally divided between the three members, Kimber, George, and William, and that the amounts so received and divided did not include the legitimate amounts received by the firm for loss, damage, and overcharge which were regularly entered on the books of the firm. We think the court committed no error in receiving in evidence the contents of this private book. Sufficient evidence had already been introduced, to say nothing of evidence afterwards offered, to make a *prima facie* case of the conspiracy charged—evidence sufficient when considered with all the inferences naturally deducible from it to justify a finding by the jury that the conspiracy as charged had been entered into. Kimber L. Barton was its moving

spirit. He made the preliminary arrangements and collected the unlawful proceeds. Although he was not expressly charged in the indictment as one of the conspirators, he falls well within the class of those "to the grand jurors unknown" who are so charged. He was engaged with Thomas and his copartners in the unlawful purpose, and his acts in furtherance of it, including the fact that he received the moneys, entered the same in a private book, and not in the regular books of the firm, and afterwards distributed them between the members of his firm, were clearly admissible against the defendants, his co-conspirators. We are not unmindful of the contention of defendants' counsel that there was no direct evidence of any unlawful undertaking with Thomas, and no direct evidence that Thomas paid Barton Bros. any money as rebates or concessions on freight charges. For argument's sake, this might be conceded. Conspirators do not act that way. Fraud is not often proven by direct testimony. A preconcerted plan to do an unlawful act must from the nature of the case be usually established by inferences drawn from the relation of the parties from the acts done and from the results achieved.

"It is not necessary to constitute a conspiracy that two or more persons should meet together and enter into an explicit or formal agreement for an unlawful scheme. * * * It is sufficient if two or more persons in any manner or through any contrivance positively or tacitly come to a mutual understanding to accomplish a common and unlawful design." *United States v. Babcock*, 3 Dillon, 581, 585, Fed. Cas. No. 14,487.

"If the evidence shows a detail of facts and circumstances in which the alleged conspirators are involved, separately or collectively, and which are clearly referable to a preconcert of the actors and there is a moral probability that they would not have occurred as they did without such preconcert, that is sufficient if it satisfies the jury of the conspiracy beyond a reasonable doubt." *Davis v. United States*, 46 C. C. A. 619, 107 Fed. 753, 755.

"It is often that the intentions of a wrongdoer are ascertained entirely by acts done which are the natural effects of unlawful designs. The acts and circumstances which accompany them showing the connection between the acts, and the motives which produced them, are generally the most convincing evidence which can be adduced." *State v. Ripley*, 31 Me. 386, 388.

Looking at the proof in the light of the foregoing well-understood rules, we entertain no doubt that the money which Kimber L. Barton received, entered in his book, and subsequently divided equally between his other partners and himself came from Thomas; that Thomas got the same from the railroad which carried Barton Bros.' freight through the colorable pretense of collecting exaggerated claims for loss, damage, and overcharge or commissions, and that all these things are clearly referable to a prearrangement to that end entered into between Thomas and the members of the firm and others. If there were any doubt about the unlawful intent of the defendants in their business relations with Barton Bros., that doubt is dispelled by the evidence of contemporaneous contracts and transactions made by

Thomas with other merchants doing business in St. Louis, Kansas City, and Omaha. Those contracts were all equally fair and innocent on their face, calling for actual service by Thomas in the way of routing the shippers' freight, prosecuting, and collecting claims for loss, damages, and overcharges, but the merchants, by their evidence, disclose the unreality or comparative unimportance of any such service. One admitted that as a result of his firm's contracts with Thomas they expected to get a cheaper rate than the usual shipper. Another said it was "inferred without discussion that his house was to get certain money * * * that Thomas understood very well that I understood," and, again, that "the results were beneficial to us * * * in the sense of refunds which we were to receive." Another testified that Thomas "was to look after all the claims we had for freight, and we were to receive a certain rebate on freights from west of the Mississippi river." Notwithstanding the explicit provision in the contracts that Thomas should attend to claims for loss, damage, and overcharge, some of the shippers testified that they took care of them and handled them for themselves without the intervention of Thomas. The evidence of all of them shows that the feature requiring Thomas to attend to their claims for loss, damage, and overcharge was treated with much indifference. Their testimony discloses, when read with discrimination and fair regard to the circumstances, that the real purpose of all of them in making contracts with Thomas was to secure rebates or refunds from the railroads on freight charges. In fact, they did receive money as a result of their arrangement. It came mysteriously to them, generally from unknown sources, sometimes by special messenger, sometimes by express, sometimes by deposit in bank to the credit of a fictitious name agreed upon, and always in currency. When received it was charged to some individual account out of the regular course of bookkeeping. It was obviously intended that the money received by them should not be traceable to any source. Tracks were covered as well as they could be, but the humiliating confession had to be made, and was made by some, that their real purpose was to secure unlawful rebates, and others are left by the proof in the uncomfortable attitude of receiving large sums of money in currency without knowing or inquiring whence it came or on what account it was paid to them. The conduct of the latter is consistent alone with the fact that they thought they were receiving money unlawfully, and all the circumstances point with much certainty to the conclusion that they actually received unlawful rebates or concessions on freight shipments as an intentional result of the contracts made between them and Thomas.

Objection was made to the introduction of evidence showing dealings between Thomas and the merchants other than Barton Bros., and the action of the court in admitting that evidence is assigned for error. There is no merit in that assignment. Nothing is better settled in the law of evidence in any case involving fraudulent intent than that other acts and dealings of the accused of a kindred character to those charged in the case in hand and performed at or about the same time are admissible to illustrate and establish the intent or motive in the particular act directly in judgment. *Wood v. United*

States, 16 Pet. 342, 10 L. Ed. 987; *Chitwood v. United States* (C. C. A.) 153 Fed. 551;¹ *Exchange Bank v. Moss*, 79 C. C. A. 278, 149 Fed. 340. The present case fitly illustrates the value of the rule in question. The same ostensible contracts, the same mystery, the same results appear in all the collateral transactions. They tell the same story of an attempted evasion of the law under the thin disguise of a formally executed contract and afford very persuasive evidence of the real intent and purpose of the accused in similar dealings with Barton Bros. in this case.

6. The contention is made that the evidence fails to disclose the formation of a conspiracy within the jurisdiction of the court below. This position under the proof to which attention has already been sufficiently called cannot be sustained. The fraudulent scheme seems to have been first devised and agreed upon in Kansas City, and it makes little difference where the misleading and deceptive formal contracts were executed. They were merely a step taken in carrying out the scheme and designed doubtless to make it more effectual.

7. It is earnestly contended that there was not sufficient evidence to connect defendant Taggart with the particular conspiracy charged in the indictment. While the proof does not connect him with the incipency of that conspiracy, it is claimed by the government that facts appear from which it may be reasonably inferred that he came into it after it was concocted with full knowledge of its existence and character and with a purpose of furthering its design. If such are the facts, he was as much a conspirator as if he participated in its original formation. *United States v. Newton* (D. C.) 52 Fed. 280; *United States v. Barrett* (C. C.) 65 Fed. 62; *United States v. Cassidy* (D. C.) 67 Fed. 698. This contention presents a doubtful question of fact, and as the case, for reasons hereafter stated, must be remanded for another trial when new evidence may be presented on the issue, it is not deemed necessary or wise to further consider it at the present time.

8. Because of the verdict of not guilty and the judgment discharging the defendants Thomas, Taggart, and Crosby on the indictment against them which was consolidated with the present indictment against Thomas and Taggart for trial, the last-named defendants interposed a plea of former jeopardy as a bar to their conviction in the present case. This plea was disallowed, and defendants assigned that action of the court as error. A brief reference to the facts will dispose of the question. The indictment against defendants and Crosby was for a conspiracy to get the Chicago, Burlington & Quincy Railway Company to give rebates to divers shippers in Kansas City. The indictment against the defendants in this case (not including Crosby) was for a conspiracy to get Barton Bros. to receive rebates from divers railroads. Notwithstanding the similarity of evidence introduced in support and defense of the two prosecutions, the offenses charged in the two indictments were totally different as a matter of law. They were grounded on different provisions of the interstate commerce act of 1903, and the acquittal in one affords no ground for discharge in the other. There had been no jeopardy on the charge contained in the present indictment. "A plea of *autrefois acquit*"

¹ 82 C. C. A. 505.

must be upon a prosecution for the same identical offense. 4 Bl. 336. It must appear that the offense charged, using the words of Chief Justice Shaw, was the same in law and in fact. The plea will be vicious if the offenses charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in point of fact. *Burton v. United States*, 202 U. S. 344, 378, 26 Sup. Ct. 688, 50 L. Ed. 1057.

Other criticisms are made of the proceedings below, and error is claimed to have been committed in the charge to the jury and in refusing to give certain declarations of law requested by defendants, but, in view of the conclusions already reached and expressed on fundamental and important questions, it is not deemed necessary for the guidance of the trial court at the next trial to express our opinion on the several incidental and less important questions presented by the assignment of errors. Most of them are answered by the proper application of the principles already laid down.

As we have already indicated, the judgment must be reversed, and we will now proceed to a consideration of one error which renders that result inevitable. The court was duly and properly asked to instruct the jury that the defendants were presumed to be innocent of the crime charged against them, and that such presumption remained with them until it was overcome by the proof. This instruction the court refused to give and exception was duly saved. It is not claimed that the request was improper, or that it should not have been given, but it is claimed that its equivalent was given to the jury in the general charge. We have critically examined the charge with a view of extracting from it, if possible, some equivalent for the instruction asked and refused, but we fail to find it. All that counsel for the government point out and claim to be such equivalent is the repeated declaration found in the general charge that the jury must find the defendant guilty beyond a reasonable doubt before a verdict of guilty can be rendered. It is earnestly contended that such instruction is the full equivalent of the one asked and refused. However interesting an original discussion of this question might be, it is not open to us. The Supreme Court has conclusively settled it. In the two cases of *Coffin v. United States*, 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481, and *Cochran & Sayre v. United States*, 157 U. S. 286, 299, 15 Sup. Ct. 628, 39 L. Ed. 704, that court has unequivocally held that a proper instruction concerning the subject of reasonable doubt was not the equivalent of an instruction concerning the presumption of innocence, and judgments of conviction in both of those cases were reversed because of refusal to give a requested instruction upon defendant's presumption of innocence like that asked in this case, notwithstanding the fact that in each the trial court properly instructed on the subject of reasonable doubt.

On the authority of those cases, we have no alternative but to reverse the judgments, and remand the causes to the court below for a new trial; and it is so ordered.

SANBORN, Circuit Judge (concurring). I concur in the reversal of the judgments in these cases for the reason stated in the foregoing

opinion, and also because it seems to me that the testimony of George A. Barton to the contents of the record book, or of the memoranda, which he swore that Kimber L. Barton kept of the moneys received for Barton Bros., was hearsay evidence, and its reception fatal error. Conceding that Kimber L. Barton was a co-conspirator with the defendants below, and that his overt acts in the execution of the conspiracy were admissible against them, the proof of those overt acts was still subject to the established rules of evidence. Whether or not he or his firm received the sums of money which George A. Barton read from that book from the defendants, or either of them, whether or not he correctly entered in that book what he or his firm received, were questions of fact which were decisive in the trial of this action. If George A. Barton had testified that Kimber L. Barton had told him that Kimber, or his firm, had received the moneys entered in that book, that testimony would have been hearsay. The mere fact that those amounts were written in the book by a person other than the witness does not change their character. Written hearsay is not more competent than oral hearsay. Before the contents of that book could become admissible evidence against the defendants, competent proof that the moneys there entered were received from the defendants, or one of them, and that Kimber L. Barton correctly wrote down in that book the amounts which he, or his firm, so received, was indispensable. Even if the concession were made, and it is not, that Kimber's statements were admissions of all the conspirators, and hence of the defendants, still the book was incompetent because there was no evidence in the case that Kimber ever said or admitted that he had correctly entered in the book, or in the memoranda, the amount of moneys which he, or his firm, had received, and George A. Barton did not testify that those moneys were correctly entered. The fact is, however, that those entries were not acts in execution of the conspiracy. The making of those entries did nothing toward the accomplishment of the purpose of the conspiracy. This purpose either had or had not been accomplished before the entries were made, hence these entries were not admissible, either as overt acts, or admissions of a conspirator, nor as independent testimony of verified writings. They were nothing but the unverified, and hence incompetent evidence of that which Kimber L. Barton happened to write.

The chief reason for the rule which excludes hearsay testimony is that its obedience subjects, while its disregard relieves, the parties whose statements are offered, from the cross-examination of opposing parties. The right of cross-examination is the great safeguard against fraud, false statements, and half truths resulting from statements of parts and omissions of other parts of conversations and transactions, which are frequently more misleading and dangerous than direct falsehoods. It furnishes the cardinal and most effective means to discover and disclose the whole truth in all judicial investigations, and, under the English and American systems of jurisprudence, the opportunity to exercise the right of cross-examination is a condition precedent to the reception of the direct evidence of the witness. *Heath v. Waters*, 40 Mich. 457, 471; *Sperry v. Moore's Estate*, 42 Mich. 353, 361, 4

N. W. 13. If the unsworn written statements of witnesses may be received in evidence upon the testimony of a third party that the witnesses told him they were true, then the witnesses who know the facts may make their written statements thereof, and tell one who knows them not that those statements are true, and the accused may be deprived of the privilege of being confronted by, and of all opportunity to cross-examine, the real witnesses against him, for, as in the case at bar, they may be conveniently absent and the witness who produces their written statements may know nothing, but that they told him they were true.

No rule of law is more salutary, or more indispensable to the security of the life, liberty, and property of the citizen, than that which prohibits the repetition of the written or oral statements of absent persons to determine issues between litigants, and commands that only after due notice, after opportunity for cross-examination of the very parties whose statements are offered, and then only under the solemnity of an oath or affirmation shall their stories be evidence. Disregard this rule, and the most sacred rights of persons and property are at the mercy of the whimsical and pernicious gossip of the reckless, the irresponsible, and the vicious. *Mima Queen, etc., v. Hepburn*, 7 Cranch, 290, 295, 3 L. Ed. 348; *Board of Com'rs v. Keene Five Cents Sav. Bank*, 47 C. C. A. 464, 470, 108 Fed. 505, 510; *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.*, 64 C. C. A. 180, 186, 188, 129 Fed. 668, 674, 676; *National Masonic Acc. Ass'n, etc., v. Shryock*, 20 C. C. A. 3, 7, 73 Fed. 774, 777. In the case in hand one of the most important, if not the most important, fact in issue was permitted to be proved to the jury by the unverified written statement of one who was either a stranger or a criminal and who was permitted to be absent from the trial, so that the defendants were deprived of all opportunity to cross-examine him on this crucial question, and of the right to be confronted with one of the principal witnesses against them. A conviction in this case ought never to be permitted to stand upon such evidence.

The other questions discussed in the opinion of the majority are not determinative of the case as it is now presented to this court, and I do not desire to be deemed to have expressed any opinion upon them.

(158 Fed. 915.)

DAVIDSON et ux. v. WOODWARD.

(Circuit Court of Appeals, Ninth Circuit. November 4, 1907.)

No. 1,450.

HUSBAND AND WIFE—COMMUNITY PROPERTY—WASHINGTON STATUTE.

Defendant entered into a contract with one having a preferential right to purchase tide lots from the state of Washington, and who had applied for such purchase, by which the right to purchase a portion of the lots was assigned to him, and he made a payment therefor. Subsequently, the state commissioners granted the application to purchase as to certain of the lots, but denied it as to others, and in consequence the contract was abandoned. Defendant married, and shortly afterward, the amount he had paid on the contract not having been returned, a new agreement

was made, by which he was given a quitclaim deed to certain of the lots in consideration of such payment, and acquired title thereto from the state; the payments being made in part with money of his wife and in part with community funds. *Held*, that under the law of the state that land acquired after marriage by a deed expressing a money consideration is presumptively community property, and that it requires clear and convincing proof to overcome the presumption, such facts were not sufficient to establish the individual ownership of defendant, nor to support a decree for the specific performance by him of a contract for the sale of one of the lots in which his wife did not join, as required by the law of the state, to make a valid contract for a sale of community property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, §§ 913, 914.

State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

Hunt, District Judge, dissenting.

Appeal from the Circuit Court of the United States for the Northern Division of the Western District of Washington.

For opinion below, see 150 Fed. 840.

William Martin, for appellants.

H. H. Field, Blaine, Tucker & Hyland, and Hughes, McMicken, Dovell & Ramsey, for appellee.

Before GILBERT, Circuit Judge, and DE HAVEN and HUNT, District Judges.

GILBERT, Circuit Judge. The appeal in this case is taken from a decree ordering the specific performance of a contract to sell land, made by the appellant James D. Davidson. One of the grounds of defense to the suit was that the land was the community property of the appellants, who are husband and wife, and could not be sold without the wife's consent. The court below found that the land was the separate property of James D. Davidson. That finding is assigned as error. The land in controversy was tide land adjoining property owned by one Wm. Laack, and which he had the preferential right to purchase from the state. The appellants intermarried on January 19, 1897. On January 27, 1897, Wm. Laack made a quitclaim deed to James D. Davidson, whereby he assigned to him the right to acquire from the state certain described lots, including the tide land which is the subject of the present controversy. On February 9, 1897, the appellants made their application to purchase said land from the state and made their first payment thereon. At the time of the marriage, Annie Davidson had about \$400 of her own money, and the first payment was made out of this money. That and the subsequent payments were made under an understanding and agreement between the appellants that all the property possessed by each at the time of the marriage was to be community property. On October 6th, all the payments having been made, amounting in all to \$732.73, the state of Washington conveyed to James D. Davidson the said property.

It is the general rule in the states in which community property is recognized, and the rule has been expressly affirmed in the state of Washington, that land acquired after marriage by a deed expressing a money consideration is presumptively community property, and that

it requires clear and convincing proof to overcome the presumption. *Dormitzer v. German, etc., Co.*, 23 Wash. 132, 62 Pac. 862. It is contended that the presumption is overcome in this case, and the court below so held by reason of the fact that James D. Davidson's right was initiated and his first payment was made to Laack prior to the marriage. There is no dispute in the testimony as to the nature of the steps taken by Davidson to acquire the title, and his relation to the property before his marriage. The controversy is only as to the legal effect of the established facts. In March, 1895, Wm. Laack, claiming to have the preferential right to purchase about 24 lots of tide lands, made application to the Board of State Land Commissioners for leave to purchase the same, and soon thereafter proposed to James D. Davidson that he take some of the lots, as there were more than he (Laack) "could handle." Davidson accepted the proposition, and an agreement was executed upon which Davidson paid Laack \$80. The written agreement was subsequently lost or destroyed and could not be produced in evidence. Laack, who was called as a witness for the appellee, testified that the agreement was to the effect that he (Laack) was to have the first 8 lots fronting the shore lots, and that thereafter the remaining 16 lots were to be divided equally between him and Davidson. It would appear from Laack's testimony that the agreement was not binding upon him, for he testified:

"I could give him eight and if I wanted to, and if I didn't want to give him any I should not give him any. It was my option."

In 1896 the Board of State Land Commissioners decided adversely to Laack's application as to a considerable portion of the property involved therein, and thereafter, according to the testimony of both Laack and Davidson, the agreement which they had made was canceled, and a new agreement was made on or about January 27, 1897, when Laack executed the quitclaim deed to Davidson above referred to. The testimony is that the former agreement was not canceled by any formal act of cancellation, but was by both parties thereto considered no longer in force, for the reason that the decision of the Board of State Land Commissioners, above referred to, had rendered its performance impossible. The \$80 paid by Davidson to Laack was retained by the latter, and it constituted the consideration for the quitclaim deed, although that instrument recited a consideration of \$1 and other good and valuable considerations. The question arises whether these facts are sufficient in law to overcome the presumption that the land is community property.

If one marries after initiating a title, it is his separate property in all cases wherein, by the doctrine of relation, the title takes effect as of the time of the first act initiating it, as in the case of a settlement under the homestead or pre-emption laws of the United States. *Harris v. Harris*, 71 Cal. 314, 12 Pac. 274; *Forker v. Henry*, 21 Wash. 235, 57 Pac. 811; *Gardner v. Burkhart*, 4 Tex. Civ. App. 590, 23 S. W. 709. Property purchased by a contract before marriage but not paid for until after marriage, is also separate property. *Lawson v. Ripley*, 17 La. 238; *Medlenka v. Downing*, 59 Tex. 32; *Wade's Succession*, 21 La. Ann. 343. In *Medlenka v. Downing*, land was purchased in

1853 by one whose wife died soon after the purchase. In 1854 he married again. It was held that the payment of a portion of the purchase money soon after the second marriage would raise no presumption that the money used was the community fund of the husband and his second wife. In *Wade's Succession*, it was held that where an unmarried woman enters into an agreement in writing before a notary public for the purpose of purchasing real property, makes a cash payment for a portion of the price, and gives her notes for the balance, due at a future date, and she marries before the maturity of the notes, the property thus acquired will, as between the husband and wife, form a portion of her separate estate.

The case principally relied on by the appellee is *Barbet v. Langlois*, 5 La. Ann. 212. In that case the plaintiff and Andre Langlois intermarried in the year 1818. At the time of the marriage Langlois owned and possessed a tract of land fronting on a bayou. During the marriage he purchased from the United States, by virtue of his right of preference as a front proprietor, the lands lying in the rear of his estate, which he was allowed to purchase under the act of 1811, giving to every person in Louisiana who owned a tract of land bordering on a river, creek, bayou, or water course the right to purchase the vacant land adjacent to and back of his tract to a depth of 40 arpents. It was held that, since the right of acquisition of the adjoining lands existed in Langlois prior to the marriage, the land became his separate property although paid for during the marriage. That doctrine was affirmed in *Succession of Morgan*, 12 La. Ann. 153, in which it was held that, where the front tract on a river belonged to the husband before the marriage, the double concession purchased by him after the marriage under the act of Congress of June 15, 1822, which was enacted after the marriage, became the property of the husband, and that the only right of the community was to claim reimbursement of the sum paid therefor if the payment was made out of the community funds. The court, following *Barbet v. Langlois*, said:

"That the cause of the acquisition preceded the marriage is a matter which can hardly admit of any doubt."

But in the present case it cannot be said that the cause of the acquisition preceded the marriage, or that at the time of the marriage J. D. Davidson possessed any right to purchase the property in controversy, or had any contract for the acquisition of such a right or had taken any step back to which the title related. The agreement which he made with Laack in 1896, it would seem from the evidence, created no binding obligation upon the latter. But if, indeed, it were otherwise, the result would be the same, for that agreement had been abandoned by both the parties thereto before the marriage took place, and at the time of the marriage there was no agreement in existence.

Again, it is to be observed that that agreement did not describe or mention the property which is in controversy. If it had been carried into effect, it cannot be known that any of that property could have been acquired by Davidson. It is true that the consideration

upon which the quitclaim deed from Laack to Davidson was made had been paid some time prior to the marriage, but neither that payment nor its retention by Laack up to and after the date of the marriage created any right in Davidson as to the land involved herein, or imposed any obligation upon Laack except to repay the money, and Laack testified that he would have paid it back if he had not made the new agreement. The earliest date at which, in the history of the title, Davidson possessed any right as to the land, was January 27, 1897, the date of the quitclaim deed.

A case in point is *Aken v. Jefferson*, 65 Tex. 137. In that case the husband had purchased certain land before the marriage. After the marriage he compromised a suit brought against him for the land by paying half of its value. The original purchase money was his separate property. The compromise money was community property. The court ruled that if the husband acquired a good title by the first purchase or by limitation, before his marriage, all the land was his separate property; but that if he did not have title at the time of his marriage, it was all community property. In *Johnson v. Johnson*, 11 Cal. 200, 70 Am. Dec. 774, the husband at the time of the marriage was in possession of certain lots to which he had no title; his claim being based upon an instrument not under seal. After the marriage he purchased the lots, paying therefor from the common funds. It was held that the land was community property. While in some of the states in which the law of community property obtains, the husband may dispose of the community property, the rule is otherwise in the state of Washington, where, although the husband has the management and control of the community property, he cannot convey or incumber it unless the wife joins with him in executing the deed or the instrument of incumbrance. 1 Hill's Ann. St. & Codes, § 1400; *Holyoke v. Jackson*, 3 Wash. T. 239, 3 Pac. 841.

The decree is reversed, and the cause remanded, with instructions to dismiss the bill.

HUNT, District Judge (dissenting). I am constrained to dissent, and deem it proper to give my reasons briefly.

The preference right to buy the land involved in this suit, together with other lands, was in Laack prior to March 25, 1895. This preference right, together with the right of assignment thereof, was expressly conferred by the statutes of the state of Washington. Sections 2175, 2176, Ballinger's Ann. Codes & St. It was pursuant to these statutory provisions that Laack on March 25, 1895, filed application to acquire title to abutting lands, including the particular lands affected by this litigation. Thereafter, on September 9, 1896, the Board of State Land Commissioners, referring to the application of Laack, made formal finding that Laack was entitled to purchase certain lands, including these particular lots. Within a few months thereafter, Laack orally agreed to sell to James D. Davidson a right to buy part of the lands which he was entitled to purchase, and Davidson then paid him eighty dollars as a consideration. The understanding seems to have been that Laack should have the first eight shore lots to be obtained, and then Davidson should have eight,

if they were there, and if there were any still remaining they were to select lots alternately, with a view to sharing equally. They then went to the office of Mr. Bronson, Laack's counsel, and made a writing of their agreement, whereby Laack bound himself to convey portion of the lots to Davidson. The loss of this contract is unfortunate, but that a written contract of sale existed is clearly proven. There is no failure to prove a writing of sale, but lack of proof of exactly what lots were specified in the writing. But a lack of proof of description should not defeat appellee's rights, if Davidson's rights to the lots were acquired under the written contract with Laack, and provided Davidson's rights thereafter passed to appellee. The statutes of Washington prescribe that where no application for purchase was pending, sales of shore lands should be made as school and granted lands are sold. As it is not contended, however, that Davidson bought as he would have had to buy if there had been no application to purchase the lots pending, it follows that he must tie to some application for purchase, or his whole case falls. Now, in the course of events, Laack had directed the release of rights to buy certain of the lots embraced within his original application, so that when title was to be conveyed by the state, there were not as many lots to be divided between Davidson and Laack as were applied for in the application of Laack. Laack and Davidson, however, agreed on a distribution of what there was, and on January 27, 1897, Laack quitclaimed to Davidson his interest in certain parcels applied for, including the lots in question, and assigned all his rights to purchase the same from the state. Meanwhile Davidson had married on January 19, 1897. Laack never asked for, and Davidson never offered, any new consideration for the quitclaim deed. Laack, who seems to have had a high idea of the obligations he was under by his first written agreement, says that the only change between the new and old contracts was "different lots were given to Davidson," and that this was "because Davidson told me there was nothing left." The evidence is also that Laack said to Davidson that they would take what was left; and the deed was made. Laack was not very definite in his testimony as to the circumstances under which the quitclaim deed was passed. In part of his testimony he said that he and Davidson had made a new agreement, and in another part he said that the money was paid under the old agreement. The witness was apparently confused by the many questions put to him in the endeavor to elicit from him statements which would justify the conclusion that the old agreement was canceled or abandoned. Toward the close of his examination, when asked whether it was not under the "new bargain" and "new arrangement" that Davidson purchased these lots from the state, the witness replied: "Well, I will tell you. Of course we made a new bargain, but the old bargain was there, and the money was there on the old bargain; the money was right with it, so I don't know whether it was a new bargain or old bargain." And, again, when asked if he had not acted under "the old agreement," the witness said: "It was the same thing. I don't see what is the difference between the old and the new. It is all the same thing, anyhow, pretty near." Without quoting further from the testimony

of the witness himself, it is plain that his right to purchase was the only basis of Davidson's right, and I think that the most reasonable construction to be put upon his evidence, when considered with the record facts, is that the quitclaim deed to Davidson was made in fulfillment of the contract to convey, which was drawn by Mr. Bronson, and for which Davidson paid Laack the eighty dollars paid, which Laack had retained. If the parties had intended to abandon the old agreement, nothing would have been so natural as for Davidson to have paid additional money, or for Davidson to have waited and purchased for a new consideration from Laack, after the state had conveyed to Laack. But he held hard to the preference right of Laack by availing himself of his rights obtained in consideration of the money originally paid to Laack. I am therefore forced to the opinion that in the whole transaction Davidson dealt with Laack in reliance upon his right to purchase, initiated under the lost agreement, and that he received his quitclaim deed in the carrying out of that agreement.

Believing then that the rights of Davidson to the property are founded upon the first agreement, and that the subsequent deed by Laack to him was but the perfecting of such original rights, and was meant to be such by both parties, and it appearing that Davidson was a single man when these rights were initiated, the law regards the property as separate, and prescribes that title thereto took effect as of a time before community. I am in accord with the opinion of the court, laying down the doctrine of community property generally, that property acquired by either spouse where "the title or cause of the acquisition" precedes the marriage is separate and not community property; but I would not exclude this case from within the application of the rule.

The preferential right of Laack was valuable and legally assignable, and I cannot agree with the conclusion that there was an abandonment of the contract made by Laack with Davidson, assigning an interest in property, to be acquired under this preferential right.

As a result of what I have said, it should follow, in my judgment, that Davidson's rights should be held to have initiated before marriage, and though perfected after marriage were not such as were merged into community ownership, but were capable of being passed by him. I think, too, that the evidence shows that he offered the property for sale, received a fair market price therefor, and ought to be held to his contract.

(157 Fed. 87.)

FISH v. FIRST NAT. BANK OF SEATTLE, WASH.

(Circuit Court of Appeals, Ninth Circuit. November 4, 1907.)

No. 1,187.

PLEADING—ANSWER—COUNTERCLAIM.

An answer construed, and, although lacking in clearness of statement, held to sufficiently plead a counterclaim as against a general demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 294.]

On rehearing.

For former opinion, see 150 Fed. 524, 80 C. C. A. 266.

Goodell & Edwards, Ostrander & Donohoe, J. B. Reinstein, W. P. Johnson, Pillsbury, Madison & Sutro, and Alfred Sutro, for plaintiff in error.

James Kiefer, for defendant in error.

Before GILBERT, Circuit Judge, and DE HAVEN and HUNT, District Judges.

DE HAVEN, District Judge. This is the second hearing of this case. On January 7, 1907, the judgment of the lower court was affirmed in an opinion which is reported in 150 Fed. 524, 80 C. C. A. 266. On March 11, 1907, a rehearing was ordered, "solely for the rehearing of the case upon the questions presented by the demurrer to that portion of the answer setting up a counterclaim against Simpson for \$2,654.15."

The answer is lacking in clearness and precision of statement; but upon further consideration we have reached the conclusion that as against a general demurrer it should be construed as alleging that Sol. G. Simpson became indebted to Fish & Loomis in the sum of \$2,654.15 for merchandise sold to, and freight and passengers carried for, him by that firm under the contract therein referred to, and that said sum has not been paid by Simpson. These facts, if proven, would, under the rule announced in our former opinion, entitle the defendant to set off the amount of such indebtedness against the note sued on.

Judgment reversed, with direction to overrule the demurrer to the answer. Mandate forthwith.

(154 Fed. 577.)

WARE v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. July 10, 1907.)

No. 2,431.

1. **CRIMINAL LAW—CONSPIRACY—STATUTE OF LIMITATIONS—WHEN CONSPIRACY AND SUBSEQUENT OVERT ACTS PUNISHABLE AFTER CONSPIRACY AND FORMER OVERT ACTS BARRED—CONSCIOUS PARTICIPATION OF DEFENDANT WITHIN THREE YEARS INDISPENSABLE.**

Where a conspiracy has been formed and an overt act has been done in execution of it more than three years before the filing of an indictment, a prosecution for that conspiracy and overt act is barred by the statute of limitations.

When in such a case subsequent overt acts are committed under the old conspiracy within the three years, the existence of the conspiracy and the conscious participation of the defendant therein within the three years are indispensable to the maintenance of a prosecution for the conspiracy. But if these facts are established by competent evidence such a prosecution may be sustained.¹

2. **SAME—EVIDENCE—PROOF OF CONSPIRACY BEFORE THE THREE YEARS COMPETENT, BUT INSUFFICIENT TO ESTABLISH IT WITHIN THE THREE YEARS.**

Proof of the formation by the defendant and others, more than three years before the indictment, of such a conspiracy as that charged in the indictment and of an overt act thereunder prior to the three years, is insufficient to sustain the charge of a conspiracy within the three years. But, in connection with evidence allunde of the existence of the conspiracy and of the defendant's conscious participation in it within the three years, it is competent evidence for the consideration of the jury in determining the issue presented by the indictment.

3. **SAME—OVERT ACT OF CO-CONSPIRATOR INCOMPETENT TO ESTABLISH CONTINUED EXISTENCE OF CONSPIRACY.**

An overt act committed by one of the alleged co-conspirators within the three years pursuant to a conspiracy between him and the defendant, formed and followed by an overt act more than three years prior to the filing of the indictment without the defendant's consent or agreement within the three years to the continued existence and execution of the conspiracy, is incompetent to establish its existence and his participation therein within the three years.

[Ed. Note.—Admissibility, on trial of joint indictments, of acts and declarations of conspirators and codefendants after accomplishment of object, see note to *Sorenson v. United States*, 74 C. C. A. 472.]

4. **CONSPIRACY—ISSUE OF JOINT ASSENT TO EXISTENCE AND EXECUTION OF OLD CONSPIRACY GOVERNED BY SAME RULES AS ISSUE OF FORMATION OF NEW ONE.**

The same rules of law and evidence govern the trial and decision of the issue whether or not a defendant jointly with others consented or agreed to the existence of a former conspiracy within the three years and the subsequent execution of it, which control the issue whether or not the conspiracy was originally formed, where that is the crucial issue.

5. **CONTRACTS—HOMESTEAD LAW—AGREEMENT TO PROCURE CITIZENS TO ENTER LANDS THEREUNDER AND GRANT USE TO ANOTHER UNTIL FINAL PROOF UNLAWFUL.**

An agreement to procure qualified citizens to enter lands under the general homestead law and to grant their use to another until they should make final proof or dispose of their holdings, without the reservation of any part of this use for the residence thereon or the cultivation thereof by the entrymen, is inconsistent with the purpose and spirit and violative

¹ See note at end of case.

of the terms of the law, although no contract is made regarding the disposition of the title which may be obtained.

6. CRIMINAL LAW—APPEAL AND ERROR—EXCEPTION FAILS UNLESS RECORD SHOWS RULING CHALLENGED ERRONEOUS.

Where evidence is admitted in the course of the trial for certain purposes, an exception to a paragraph in the charge of the court, which declares that this evidence was properly admitted for these purposes, in the absence of any request to the court to exclude any specific evidence or to limit its effect, and in the absence of any objection or exception to its admission, and in the absence of any specification of the particular evidence challenged, is unavailing, because in such a case the record fails to prove the error, and the presumption that the action of the court below was right must prevail.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2619.]

Phillips, District Judge, dissenting.

(Syllabus by the Court.)

In Error to the District Court of the United States for the District of Nebraska.

T. J. Mahoney and Henry Frawley, for plaintiff in error.

Charles A. Goss and Sylvester R. Rush, for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. On November 24, 1905, and on November 28, 1905, Ware, the defendant below, Frank W. Lambert, and Harry Welch were indicted under section 5440 of the Revised Statutes [U. S. Comp. St. 1901, p. 3676], for conspiring to defraud the United States of the title, possession, and use of certain tracts of land by means of fraudulent entries under the homestead laws. The first indictment relates to entries under sections 2289, 2290, 2304, Rev. St. [U. S. Comp. St. 1901, pp. 1388, 1389, 1413], the general homestead law, and the second to entries under the Kincaid act (Act April 28, 1904, c. 1801, 33 Stat. 547 [U. S. Comp. St. Supp. 1905, pp. 325, 326]), which authorizes each homesteader to enter 480 additional acres contiguous to his original homestead in a certain specified district. The defendant was tried alone on the two indictments and found guilty on all the counts of the second and on all but one of the nine counts of the first indictment.

Each of the counts of the indictment charged a conspiracy and an overt act thereunder within three years of the filing of the indictment in which it was found. There was evidence of a conspiracy between Ware and Lambert to cause fraudulent entries under the homestead laws and of an overt act, the procurement of one McKibben to make a fraudulent affidavit and application for a homestead entry more than three years before the indictments were filed, so that a prosecution for that conspiracy and act was barred by the statute of limitations. There was substantial evidence that within the three years Lambert caused homesteaders to make fraudulent entries, charged Ware upon his account books for expenses and services in causing these entries, in building shacks upon the lands entered in order to enable the homesteaders to prove their right to title, and in

maintaining the claims of the homesteaders, pursuant to the conspiracy of 1902, and that Ware knew of some of these acts, examined these account books, and paid Lambert for these acts pursuant to the agreement of 1902. By a request for a peremptory instruction and by other requests for instructions, which were denied, counsel for the defendant presents this question:

Where the conspiracy was formed and an overt act was done in pursuance of it more than three years prior to the indictment, and overt acts were subsequently done in the execution of it within the three years, may one of the conspirators be successfully prosecuted for it? The question is answered in the negative in *U. S. v. Owen* (D. C.) 32 Fed. 534, *U. S. v. McCord* (D. C.) 72 Fed. 159, 165, and in *Ex parte Black* (D. C.) 147 Fed. 832, 841. It is answered in the affirmative in *U. S. v. Greene* (D. C.) 115 Fed. 343, 347, 349, 350, *U. S. v. Greene* (D. C.) 146 Fed. 803, 889, *Lorenz v. U. S.*, 24 App. Cas. Dist. of Columbia, 337, 387, *U. S. v. Bradford* (C. C.) 148 Fed. 413, 416, 419, *U. S. v. Brace* (D. C.) 149 Fed. 874, 876, *Commonwealth v. Bartilson*, 85 Pa. 482, 488, *People v. Mather*, 4 Wend. (N. Y.) 259, 21 Am. Dec. 122, *American Fire Ins. Co. v. State*, 75 Miss. 24, 35, 22 South. 99, 102, and *Ochs v. People*, 25 Ill. App. 379, 414. After a careful reading and consideration of these and other authorities, our conclusions are that the true answer to this question is that the existence of the conspiracy and the conscious participation of the defendant therein within the three years are indispensable to the maintenance of such a prosecution; but that, if these facts are established by competent evidence, such a prosecution may be sustained. Proof of the formation by the defendant and others, more than three years before the indictment, of such a conspiracy as that charged in the indictment under which an overt act has been done prior to the three years, is insufficient to sustain the charge of a conspiracy within the three years. But in connection with evidence aliunde of the existence of the same conspiracy, and of the defendant's conscious participation therein within the three years, it is competent evidence for the consideration of the jury in determining the issue presented by the indictment. An overt act committed by one of the alleged conspirators within the three years pursuant to a conspiracy between him and the defendant, formed and followed by an overt act more than three years prior to the filing of the indictment without the defendant's consent or agreement within the three years to the continued existence and to the execution of the conspiracy, is incompetent to establish its existence and his participation therein within the three years.

The offense under section 5440 is the conspiracy, not the conspiracy and the overt act. "The provision of the statute," says the Supreme Court, "that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentiae*, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute." *U. S. v. Britton*, 108 U. S. 199, 205, 2 Sup. Ct. 525, 27 L. Ed. 703. So that there is a *locus penitentiae* after the performance of each overt act and a presumption of the innocence of the defendant, and if, after the performance of the first overt act, a defendant abandons the design of the conspiracy,

and the prosecution of the conspiracy and of the first overt act becomes barred by the statute, the overt acts of other conspirators within the three years in the performance of the old conspiracy without the conscious participation of the defendant ought not to charge, and cannot charge him with the offense, because they fail to evidence his intent to violate the law within the three years.

On the other hand, the offense denounced by section 5440 is not the mere formation, but the existence, of the conspiracy and its execution. And if by the agreement, or by the joint assent of the defendant and one or more other persons, within the three years, the unlawful scheme of the conspiracy is to be prosecuted, and an overt act is subsequently done to carry it into execution, the mere fact that the same parties had conspired and had wrought to accomplish the same or a like purpose, more than three years before the filing of the indictment, ought not to constitute, and does not constitute, a defense to the charge of the conspiracy within the three years.

The same rules of law and of evidence govern the trial and the decision of the issue whether or not the defendant jointly with others consented or agreed within the three years to the existence of the conspiracy and the subsequent execution of its scheme which control the trial of the issue whether or not the conspiracy was originally formed, where that is the crucial question. Evidence must be produced from which a jury may reasonably infer the joint assent of the minds of the defendant and of one or more other persons within the three years to the existence and the prosecution of the unlawful enterprise. Until such evidence is produced, the acts and admissions of one of the alleged conspirators are not admissible against any of the others unless the court in its discretion permits their introduction out of their order. But where evidence has been produced from which the joint assent of the defendant and one or more other persons within the three years to the existence and execution of the conspiracy may reasonably be inferred by the jury, then any subsequent act or declaration of one of the parties in reference to the common object which forms a part of the *res gestæ*, may be given in evidence against one of the others who has consented to the enterprise. And the joint assent of the minds of a defendant and others within the three years to the existence and execution of the conspiracy may be found by the jury like any other ultimate fact as an inference from other facts proved. *Drake v. Stewart*, 22 C. C. A. 104, 107, 76 Fed. 140, 143.

In view of these rules of law and the facts of this case, was there error in the refusal of the court below to give the instructions requested by counsel relative to this question? The main issue at the trial involved the character of the agreement between Ware and Lambert, which was made in the summer or fall of 1902, and more than three years before the filing of the indictment. Lambert testified, in effect, that this contract was that he should procure qualified homesteaders to enter public lands within the inclosure of the U. B. I. Land & Cattle Company, a corporation of which Ware was president; that he should erect a building for each of them upon their lands in order to enable them to prove up and secure title; that he should cause them to prove up and procure title to their respective tracts

from the United States, to give to Ware the use of these lands for grazing purposes until they obtained title under the homestead laws, and then to convey the lands to him for \$150 for each quarter section; and that Ware agreed to pay this \$150 for each quarter, to pay all the expenses of the homesteaders including their expenses of travel and their fees at the land office and to pay Lambert his expenses and \$50 for each homesteader whom he procured to carry out this agreement. Ware admitted that he made an agreement with Lambert, but he testified that he never made any contract to buy or to take the title to any of these lands. He insisted that the limit of the agreement was that he should pay the necessary expenses of the homesteaders in filing and making improvements upon their lands until they secured title in consideration that they should give to him the use of these lands for grazing purposes until they proved up and secured their titles from the government. Whatever the terms of the agreement may have been, there was ample evidence to sustain a finding by the jury that it constituted an unlawful conspiracy to defraud the United States of the possession, use, and title of these lands. There was also persuasive evidence that Lambert procured one McKibben to make an entry under this agreement more than three years before either of the indictments were found, that there was no new or different agreement subsequent to that time, and that in the execution of this agreement he procured within the three years at least 15 persons to enter tracts of land within the inclosure of the U. B. I. Company, constructed shacks upon some of these tracts, took leases of some of them from the homesteaders to Ware for 99 years, paid all the expenses of the homesteaders, charged these expenses as they were paid, to Ware, in his account books, wherein they were sufficiently set forth to indicate their character, that he showed these books to Ware, who looked at the books and at the entries, and that he and Ware balanced up from the information which they obtained from these books, and Ware paid the charges against him thereon to the amount of \$1,906.73. None of the homesteaders ever spent a day or a night in the shacks upon the land which they entered or cultivated or used a foot of it. The defendant himself testified that during the three years prior to the indictment he received these leases, looked at the account books of Lambert and at the entries therein, and paid the charges thereon, and during all this time he had the exclusive use of the lands upon which these homesteaders filed. Here was substantial evidence of the joint assent of the minds of Ware and Lambert within the three years to the existence and execution of the conspiracy to defraud the United States of the possession, use, and title of these lands, and of the conscious participation of the defendant therein, and hence there was no error in the refusal of the court to instruct the jury to return a verdict for the defendant.

The second request of his counsel upon this subject was that, unless the jury found that the unlawful agreement between Ware and Lambert charged in the indictment was made and the first overt act under it was done within three years prior to the filing of the indictments, or of one of them, they must find a verdict of not guilty, and this request was rightly refused because, although the unlawful agree-

ment was made and the first overt act under it was done prior to the three years, yet if, within the three years, the minds of the defendant and Ware met, and they agreed or assented to the existence and execution of the unlawful conspiracy within the three years, and the defendant consciously participated therein, he was still guilty of the offense charged.

The third request called to our attention was that if the jury found that whatever agreement was made between Ware and Lambert in respect to the matter of procuring filings and entries to be made upon lands of the United States was made prior to the filing of either indictment, and that all the filings and entries given in evidence were made or procured in pursuance of that agreement without a new agreement or conspiracy between the defendant and Lambert, then the jury must return a verdict for the defendant. But this request was misleading, and hence rightly refused because it declared that a new agreement or conspiracy in respect to the procuring of the filings and entries was indispensable to a conviction when a joint assent of the minds of Ware and Lambert within the three years to the existence and execution of the old conspiracy and Ware's conscious participation therein were sufficient to constitute the offense.

The fourth request was that:

"The presumption of innocence continues with the defendant throughout the entire trial, until the jury is satisfied beyond a reasonable doubt of his guilt, and unless upon a consideration of all the evidence in the case you are convinced of his guilt beyond a reasonable doubt, and likewise that he committed the offense charged within the period of three years before the 24th day of November, 1905, it will be your duty to return a verdict of not guilty."

The court did not give any part of this request in the words of counsel. But it instructed the jury in its own words, satisfactorily to counsel for the defendant, upon the presumption of innocence, and then, taking the first count of one of the indictments as its text, it instructed them that the defendant was charged with unlawfully conspiring with Lambert and others on the 28th day of November, 1902, to defraud the United States of the title and use of its lands and with inducing and hiring one Bunn on the 28th day of November, 1902, to file a fraudulent application to enter a tract of land as a homestead; that the offense was the conspiracy, the unlawful agreement charged; that the combination or agreement as charged in the indictment must be proved; that it had permitted the introduction of evidence of the McKibben entry and of other entries not named in the indictments, but that this evidence "was received, not for the purpose of being the basis upon which the government would be entitled to a verdict of guilty, but it was received solely for the purpose of throwing light upon the transactions mentioned in the indictment so far as it might in determining, first, whether or not there was a conspiracy such as charged upon the part of any of the parties connected with said entry, and, secondly, to determine the motive and intent of the parties in entering into such conspiracy or agreement. But unless you find the defendant guilty beyond a reasonable doubt upon one or more of these specific arrangements or overt acts, alleged in the indictment, or at least upon one of them, you cannot find him guilty, even if you

should believe him guilty of an unlawful conspiracy or agreement in respect to any of these matters which are not specifically alleged in the indictment. He is upon trial for the specific acts charged in the indictment, and those only, and you cannot find a verdict of guilty for some other act not charged in the indictment." The conspiracy was charged within the three years in every count of the indictments. The court instructed the jury that the conspiracy was the offense; that it must be proved as charged in the indictment; that they could not find the defendant guilty, although they believed he had entered into an unlawful conspiracy to cause the McKibben entry; but that they must find a conspiracy as charged in the indictments to procure the entries of the lands there specified. The jury could not have failed to understand, in the face of these instructions, that they must find the existence of the conspiracy within the three years, and hence there was no error in the refusal of the fourth request. Where a rule or principle of law is declared by the court in its general charge, it is not error for it to refuse to repeat it in the words of the attorney who requests it. *Southern Pac. Co. v. Schoers*, 52 C. C. A. 268, 275, 114 Fed. 466, 473, 57 L. R. A. 707; *Chicago Great Western Ry. Co. v. Roddy*, 65 C. C. A. 470, 475, 131 Fed. 712, 717.

The court charged the jury that the mere advancing of money to a party to enable him to enter his homestead and advancing money to make improvements thereon are not of themselves unlawful acts, but are simply acts and circumstances which may be considered in determining whether or not there was an unlawful agreement by which the entryman was to make the entry, not for his own use and benefit, but for the use and benefit of another. "Neither is it unlawful for a person," said the court, "having a bona fide homestead entry, to permit another to cultivate and use portions thereof. Such fact, if it be a fact, however, is to be considered with the other evidence in the case in determining the good faith and bona fides of the entryman." Counsel for the defendant complain that the court refused to instruct the jury that:

"If the arrangement which the defendant entered into with Frank W. Lambert contemplated no more than that the defendant should pay said Lambert a commission and should pay the necessary expenses of entrymen in making their filings and in proving the claims upon which they should enter and in making final proof, and that in consideration of such assistance the defendant was to have been permitted to graze his cattle over such lands and adjacent lands or to use such lands until such time as the entrymen should prove up or dispose of their holdings, but did not contemplate any arrangement by which the defendant or any person other than the entryman should succeed to, or get the benefit of such title as the entryman might obtain from the government either in whole or in part, such an arrangement would not be an unlawful conspiracy and your verdict will be not guilty."

The evidence was that the lands which were to be entered were within the inclosure of Ware's company, that they were unfit for cultivation, and that Ware's company was using them for grazing purposes. The effect of the requested instruction was that it was lawful for Ware and Lambert to agree to procure qualified homesteaders to enter lands under contracts with them that Ware should have the use of these lands until such time as the entrymen should prove up

or dispose of their holdings on condition that Ware and Lambert made no agreement that these entrymen should dispose of the titles which they might acquire from the government after they obtained them. But the purpose of the homestead laws is to induce settlement, cultivation, and the establishment of homes upon the public lands. The law requires the homesteader to reside upon his land at least one year before he may make his proof of title. It requires him to make an affidavit before he enters the land that he applies to enter it "for his exclusive use and benefit and that his entry is made for the purpose of actual settlement and cultivation, not either directly or indirectly for the use or benefit of any other person." Rev. St. § 2290. It is true that a homesteader may lawfully cut and remove such timber from the public lands he enters as it is necessary for him to remove to enable him to reside upon, improve, and cultivate the land before his final proof. But the cutting of the timber or any other use of the land or of its products by him prior to his final proof must be incident to his actual cultivation, improvement, and living upon the land, in good faith, to procure his homestead for his own benefit. *Grubbs v. U. S.*, 105 Fed. 314, 320, 321, 44 C. C. A. 513, 519, 520; *Conway v. U. S.*, 95 Fed. 615, 619, 37 C. C. A. 200, 204.

The use of the land entered by a homesteader, together with adjacent lands by another person for grazing purposes, until the entryman makes his final proof or disposes of his holdings, without the reservation or application of any part of the land or of its use to cultivation or to residence thereon, is inconsistent with the purpose and spirit and violative of the provisions of the law, and an agreement to procure homesteaders to make entries of public lands in order that third persons may obtain such use from them is an unlawful agreement. It is a contract to induce homesteaders to make applications to enter lands, not for their exclusive use and benefit, but for the use and benefit of another in violation of the oaths they are required to take when they make their applications to enter, and there was no error in the refusal of the court below to instruct the jury that such a contract was not an unlawful conspiracy. If qualified homesteaders could lawfully lease or grant the use of the lands they might enter to others, without restriction or reservation, until they should prove up or dispose of their holdings, third parties might appropriate to themselves by the use of successive homesteaders, who would dispose of their holdings before they made proof of title, large tracts of the public domain for indefinite periods, and might thereby retard or prevent the use or sale of these lands by the United States.

Counsel specify this paragraph of the charge of the court as error:

"Statements of Lambert, Welch, and others in the absence of the defendant on trial, and conversations with some of the witnesses on the part of Lambert, Welch, and others, in the absence of the defendant, have been given in evidence. It is proper that I should say to you that this evidence was admitted as bearing upon the question of the existence of a conspiracy and its nature, if any there was, and its shedding light upon the relation of the persons so speaking to the transaction. These declarations, statements, and communications were and are admissible as bearing upon the question of the existence of the alleged conspiracy and as touching the alleged connection of the persons making them therewith."

They insist that this instruction was erroneous: (1) Because it directed the jury to consider the admissions and declarations of others than the alleged co-conspirators, Lambert and Welch; (2) because it made the declarations and admissions of the alleged co-conspirators evidence of the alleged conspiracy; and (3) because it made the declarations of the alleged co-conspirators evidence against the defendant whether they were made during the pendency of the conspiracy, and in the execution of it, or before or afterward. The third objection is untenable, because counsel did not call the attention of the court to the specific exception to or limitation upon the general rule that the declarations and admissions of co-conspirators are evidence against their fellows after proof of the conspiracy, which they now insist should have been declared, so that the court did not consider or refuse to declare this limitation. All the objections to this portion of the charge are answered by the following considerations: Counsel point out no declarations, statements, or admissions of Lambert or of Welch or of others that were erroneously admitted in evidence, and they call attention to no objection or exception to the admission of any such declaration, statement, or admission. When the portion of the charge under consideration is examined, it is found to be nothing more than a declaration that evidence that had been admitted in the course of the trial for the purposes therein stated was properly received. If any of this evidence was inadmissible, the time to challenge it and to preserve the right to correct in this court the error of its admission was when it was offered, when the specific declarations, admissions, and conversations and their relations to the other evidence and the issues in the case could be properly seen by the court below and could be portrayed upon the record for the consideration of this court. As counsel make no complaint of any ruling admitting any of this evidence, and call our attention to no specific declaration, admission, or conversation that was erroneously received in evidence, and as circumstances might have existed which would have rendered such declarations, admissions, or conversations admissible in evidence, as where they were repeated to and confirmed by the defendant, or where they were admitted without objection or exception by the defendant, or were introduced by the defendant, or were drawn out by proper cross-examination of his witnesses, counsel have failed by a mere exception to this portion of the charge, without any request to exclude the specific evidence challenged, to overcome the *prima facie* presumption which always exists that the action of the court below was right. The burden is always on him who alleges error in the ruling of a court to establish that error by the record which he presents to the appellate court, and, in the absence of such proof, his objections cannot prevail. *Chicago Great Western Ry. Co. v. Price*, 38 C. C. A. 239, 250, 97 Fed. 423, 434; *Southern Pac. Co. v. Arnett*, 61 C. C. A. 131, 133, 126 Fed. 75, 77. In the absence of any showing in the record of the declarations, admissions, and conversations to which the court referred in its charge, of their connection with, and relation to, the other evidence in the case and of the circumstances under which the court received them in evidence, the defendant has not adequately borne this burden. This

record fails to show that the evidence referred to was not lawfully admitted for the purposes stated and the exception to the portion of the charge here challenged cannot be sustained.

The judgment below must be affirmed, and it is so ordered.

PHILIPS, District Judge (dissenting). I express no dissatisfaction with the majority opinion, save in respect of the manner in which the trial court dealt with the application of the statute of limitations to this case, and the implied approval thereof by the affirmance of the judgment.

There is no place in this record for any discussion of the question as to whether or not the existence of the original conspiracy between Ware and Lambert might be inferred simply from the fact of overt acts done by them, for the reason that the government, by its witness Lambert, made direct proof of the agreement between him and Ware entered into in the district of Nebraska in the month of October, 1902. Its character and purpose, as well as the manner to be pursued in its execution, were thus developed by the government. It put in evidence as an overt act done in furtherance of said agreement the transactions respecting the McKibben entries, which were more than three years prior to the finding of the indictment. It is conceded that the commission of the first overt act in furtherance of the conspiracy agreement put into operation the three years' statute of limitations.

In *United States v. Britton*, 108 U. S. 199, 2 Sup. Ct. 531, 27 L. Ed. 698, the court said:

"This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute that there must be an act done to effect the object of the conspiracy merely affords a *locus penitentiæ*, so that, before the act done, either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. It follows as a rule of criminal pleading that in an indictment for conspiracy, under section 5440, the conspiracy must be sufficiently charged, and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy."

In *Dealy v. United States*, 152 U. S. 546, 14 Sup. Ct. 683 (38 L. Ed. 545), the court again said: "The gist of the offense is the conspiracy." This is emphasized by the ruling in *Callan v. Wilson*, 127 U. S. 540, 555, 8 Sup. Ct. 1301, 32 L. Ed. 223, where it is asserted that the confederation or combination of two or more persons to do an unlawful act is in and of itself, at common law, an indictable offense, because such combination against the law is deemed more dangerous to the public peace and security than if done by a single person. Hence it is that the court, in *Clune v. United States*, 159 U. S. 590, 595, 16 Sup. Ct. 125, 40 L. Ed. 269, held that, although the act intended to be effected was forbidden by a special statute, which prescribed a minor punishment, as a fine without imprisonment, yet the charge of conspiracy under section 5440, if sustained, is sufficient to subject the party to the severer punishment, as a felony.

The conspiracy shown by the government to have been entered into between Ware and Lambert in October, 1902, made effective by an overt act, could no more form the basis of this prosecution

than if Ware had been indicted therefor within three years thereafter and convicted or acquitted thereof. The statute of limitations was as effectual a bar as a plea of *autrefois* convict or *autrefois* acquit.

No matter how many overt acts may have been committed by Lambert pursuant to that conspiracy, there was but one act for which the parties could be punished, and that was the consummated unlawful conspiracy. The action of the trial court recognized this as the law, for, while the plaintiff in error was found guilty on several counts, there was but one sentence imposed, as the conspiracy, and not the overt act, was the offense made punishable by the statute. Indeed, there was no occasion for more than one count in this indictment. After alleging the existence of the conspiracy, it was perfectly competent to proceed to set out in the same count all of the overt acts claimed to have been committed in furtherance thereof.

The irrefutable logic of the law, it must therefore be conceded, is that, no matter how many overt acts may be committed, if they are referable to one and the same conspiracy, they constitute not several conspiracies or evidence of as many conspiracies. The conspiracy on which the minds of the parties met was one and indivisible, and whenever it is consummated by the commission of one overt act, a statutory limitation, *eo instanti*, attaches and creates a bar to the prosecution. The corollary of this postulate indisputably must be that, after the original conspiracy has been followed by any overt act, more than three years prior to the indictment, to support the prosecution under the statute there must be a wrongful agreement found and an overt act done in furtherance thereof within the three years.

Names are of little consequence here. Whether we call it a new or renewed conspiracy, the essential requirement of the law, to give the statute of limitations the protective efficacy of its spirit, is that there must be a conspiracy between the parties charged formed within the statutory period of limitation.

To constitute any agreement as the basis of a civil action or criminal prosecution, there must be the *aggregatio mentium*—the coming together of the minds of the parties in the formulation of its terms. It must be established by competent, substantial evidence, and not by conjecture, and in a criminal case like this it must be established to the satisfaction of the jury beyond a reasonable doubt.

This brings us face to face with the crucial question in this case: The indictment charges a conspiracy formed within three years after the alleged conspiracy of October, 1902, was barred by the statute of limitations, and it sets out the overt acts done in pursuance of the conspiracy. There is no allusion in the indictment whatever to the antecedent conspiracy agreement of October, 1902, and the first overt act done thereunder; nor is there any allegation that that agreement was continued to within the three-year period, by any wrongful agreement or any co-operation or participation of the parties in the overt acts. And yet, to support the indictment, the government made proof of the antecedent agreement of 1902 to make out a case. And what is most remarkable in the trial of the case the government made proof of the McKibben entries in furtherance of the original conspiracy, which confessedly occurred more than three years prior to the in-

dictment. In respect of this the court told the jury that this evidence "was received solely for the purpose of throwing light upon the transactions mentioned in the indictment, so far as it might, in determining: First, whether or not there was a conspiracy such as charged, upon the part of any of the parties connected with said entry; and, second, to determine the motive and intent of the parties in entering into such conspiracy or agreement."

No refinement or specious reasoning can obscure the fact that the jury were thus authorized to determine whether or not there existed the conspiracy charged in the indictment by having recourse to the McKibben entries. In other words, the jury were warranted in inferring the existence of the essential fact of a renewal of the antecedent conspiracy, barred by the statute of limitations, from the character and quality of an overt act done more than three years prior to the conspiracy laid in the indictment; and the jury were further authorized, from such antecedent barred overt act, "to determine the motive and intent of the parties in entering into such conspiracy or agreement." What conspiracy or agreement was meant? As the McKibben entries were in furtherance of the original agreement, legitimately it could only be employed to throw light upon the character of that antecedent conspiracy. It could not throw light upon the claimed renewal conspiracy not then in existence. Yet, as shown by the majority opinion, the McKibben entries are referred to and used to support the conclusion that Ware's purpose was to secure to himself, by reason of the conspiracy agreement, the entire use and benefit of the simulated homestead entries.

The charge of the court further in this immediate connection was as follows:

"But unless you find the defendant guilty beyond a reasonable doubt upon one or more of these specific arrangements or overt acts, alleged in the indictment, or at least upon one of them, you cannot find him guilty, even if you should believe him guilty of an unlawful conspiracy or agreement in respect to any of these matters which are not specifically alleged in the indictment. He is upon trial for the specific acts charged in the indictment, and those only, and you cannot find a verdict of guilty for some other act not charged in the indictment."

From which the jury might well have conceived that the thought conveyed to them was: (1) That they might infer the existence of the conspiracy charged within the three years from "the overt acts, or at least upon one of them"; and (2) that the only reason why a conviction could not be based upon the McKibben entries was because they were not counted upon in the indictment. Inviting, as did the introduction in the case of the McKibben entries, the invoking of the statute of limitations thereto, the court refrained from any allusion whatever to it as a reason that no prosecution or conviction could be predicated thereon, and from the beginning to the end of the charge of the court not a single allusion is made to the defense persistently pressed by Ware's counsel of the question of the statute of limitations. Yet, the majority opinion states that "there was also persuasive evidence that Lambert procured one McKibben to make an entry under this agreement more than three years before either of the indict-

ments were found, that there was no new or different agreement subsequent to that time, and that in the execution of this agreement he procured, within three years, at least 15 persons to enter tracts of land within the inclosure of the U. B. I. Company," and that the parties did acts thereunder indicating the continuation of the conspiracy.

If there was no "new or different agreement" from that under which the McKibben entries were made, and that agreement was barred when the overt act evidenced by said entries was committed, then subsequent overt acts within the three-year period were clearly referable to, and were in pursuance of, the original agreement. So if the McKibben entries had occurred inside of the three-year period, then every subsequent overt act could have been laid in one and the same count as in furtherance of the agreement entered into in October, 1902.

Thus we are confronted with the proposition of a continuing offense without any direct proof of the meeting of the minds of the parties in a new or renewal agreement, in order to toll the statute of limitations.

In *United States v. Irvine*, 98 U. S. 450, 25 L. Ed. 193, an attorney was indicted for unlawfully withholding pension money after demand. The indictment was found in 1875, when the attorney had wrongfully withheld the money since 1870. After holding that the crime could not begin until the attorney had received the money, and had either refused to pay it over, or had done such act as indicated an intention to wrongfully withhold it, the court said:

"When it [i. e., the wrongful act] is committed, the party is guilty and is subject to criminal prosecution, and from that time, also, the statute of limitations applicable to the offense begins to run. * * * He pleads the statute of two years, a statute which was made for such a case as this; but the reply is: 'You received the money. You have continued to withhold it these 20 years; every year, every month, every day, was a withholding within the meaning of the statute.' We do not so construe the act. Whenever the act or series of acts necessary to constitute a criminal withholding of the money have transpired, the crime is complete, and from that day the statute of limitations begins to run against the prosecution."

The leading case relied upon by the majority opinion is that of *Commonwealth v. Bartilson*, 85 Pa. 482. The indictment in that case contained two counts. The first alleged a certain conspiracy and overt acts done in pursuance thereof, some of which were within the two-year period of limitations, and others without the two years. The second count alleged simply the conspiracy, but no overt acts. Upon demand by defendant's counsel, pursuant to the provisions of the Pennsylvania practice, the prosecutor presented a bill of particulars of the matters he expected to prove under the second count. When furnished, the particulars disclosed that the prosecutor expected to prove the same conspiracy and the same overt acts as those charged in the first count. Thereupon the court quashed both counts. The Supreme Court sustained the action in quashing the first count, and reversed it as to the second count, not, however, upon the notion that each overt act was a renewal of the conspiracy, but it was merely evidence. The court said:

"It is strongly urged, however, that inasmuch as it was averred in said count that the defendants had, in 'pursuance and renewal of said conspiracy,'

committed divers overt acts specifically described in said count, the date of one of which at least was within the statutory period, there was a continuance and a renewal of the conspiracy from time to time, and the statute was thereby tolled. This is plausible but unsound. The offense charged was the conspiracy. According to all the authorities, the conspiring is the essence of the charge, and if that be proved the defendants may be convicted. * * * According to the first count, the offense was complete on the 20th of December, 1874. The overt acts set forth do not constitute the offense. They are the evidence of it, and are sometimes said to be the aggravation of it. An overt act may or may not be unlawful, *per se*. It is because of its relation to an unlawful combination that it becomes obnoxious to the criminal law. * * * The commonwealth must allege and prove a conspiracy within two years. If this cannot be done, the commonwealth has no case. The pleader evidently felt the strain of this part of his case when he introduced the averment that the overt acts were in 'renewal' of the original conspiracy. It was practically laying an offense with a *continuando*. It was an attempt to prove the existence of a crime within the statutory period, by showing its commission outside of such period, and that it had been continued down to a time within it."

Then advertng to the language employed in a former decision by the same judge, to the effect that there was no such thing as a continuing offense, he said that it was not intended to assert that a man might not repeat an offense from day to day, as in the case of maintaining a nuisance, and other familiar instances which might be referred to, which might be done daily for an indefinite period, and then said:

"But a man could not be convicted of maintaining a nuisance charged to have been committed 10 years prior to the finding of the bill of indictment by proving that he had continued the nuisance, day by day, to a time within the statutory period."

The court held that the trial court erred in suppressing the first count, as it charged a conspiracy within the period of two years, as the jury might be warranted in finding the essential fact or a new or renewal conspiracy from the character of the acts done thereunder. From which it is quite clear, to my mind, that the court intended nothing more than to say that the existence of the conspiracy itself might be found to exist, in the absence of direct evidence as to its formation and its terms, by overt acts indicating that it had been renewed from time to time, when "each renewal constitutes a fresh conspiracy for which an indictment will lie."

There is no disguising the fact that this case was tried throughout upon the idea that the mere proof of overt acts, done within three years, was sufficient to toll the statute of limitations. This was the theory upon which the attorney for the government laid stress in his argument before this court. The whole substance of the charge of the court respecting the conspiracy was: (1) That the first inquiry should be: "Was there an unlawful agreement entered into by two or more parties named in the indictment to defraud the United States out of certain of its public lands mentioned in the indictment." (2) That this agreement "must be proved, because without a corrupt agreement or understanding there is no conspiracy, but circumstantial evidence may be resorted to to show the agreement or conspiracy, the acts of parties in the particular case, and the character of the transactions or series of transactions, with the accompanying

circumstances as the evidence may disclose them, from which evidence may be derived of the existence or nonexistence of an agreement, which may be expressed or implied." And (3) "should you find that there was a conspiracy entered into, as charged in the indictment, and that the defendant, Ware, was one of the parties to such conspiracy, then you should inquire whether or not one or more of the parties to such conspiracy did the act or acts in pursuance or in furtherance of such conspiracy and unlawful agreement, as is charged in the indictment, which I have denominated and called the overt act."

In so far as the jury were advised by the court, if they believed the testimony of the witness Lambert, that he and Ware entered into an agreement in October, 1902, to effect the homestead entries for Ware's sole use and benefit, that as that "was an unlawful conspiracy or agreement entered into of the character charged in the indictment," they were authorized to convict on that agreement. The subsequent language, "if you find that there was an unlawful conspiracy of the character charged in the indictment," was perfectly consistent with what preceded. "A conspiracy entered into as charged in the indictment" by no reasonable intendment can be held to have conveyed to the minds of the jury that it was essential to find that the agreement and the first overt act done thereunder must have occurred within three years next before the finding of the indictment. This for the palpable reason that the government's evidence showed that the agreement was entered into beyond the three-year period; and, as already shown, the court told the jury that the McKibben entries, made in furtherance of that agreement, could be looked to as throwing light on the character of the conspiracy agreement, and to enable them to determine whether or not there was a conspiracy. As already stated, there was not one syllable in the charge suggesting to the jury that there was such a thing as the statute of limitations applicable to prosecutions for such conspiracy, nor was there a single suggestion of the necessity of proving, after the statute of limitations attached to the McKibben entries, to the satisfaction of the jury, beyond a reasonable doubt, that there had been a renewal of the original agreement, or even that they should find that there had been overt acts pursuant thereto committed within the three years, participated in by both the parties.

The majority opinion suggests certain acts done within the three-year period from which the jury might be warranted in finding the required renewal, or joint participation by both Lambert and Ware. It is sufficient to say that no such question was submitted by the court to the jury. That was a question of fact which the jury alone was authorized to respond to in a criminal case. On discussion before them they might have entertained a different notion of the effect of such facts from that of the court.

The nineteenth request made by defendant for an instruction was:

"Unless you [the jury] find from the evidence beyond a reasonable doubt, that he [Ware] did make such an unlawful agreement with Frank W. Lambert as is set out in one or both of the indictments in question, and that that agreement was made within three years prior to the finding of such

indictment, and that the first overt act done by either the defendant or Lambert pursuant to such agreement was done within three years prior to the finding in the indictments herein or one of them, you will return a verdict of not guilty."

The twentieth request was to the effect that if the jury found from the evidence that whatever agreement was made between Ware and Lambert was made either in August or October, 1902, and that the filing referred to in the first of the McKibben entries was made prior to November 24, 1902, and that all of the filings and entries which were given in evidence were made or procured in pursuance of and to effect the object of the agreement made between the defendant and Lambert in August or October, 1902, or prior to November 24, 1902, without a new agreement or conspiracy between the defendant and Lambert, they should find a verdict of not guilty.

The twenty-first request asked the court to charge the jury that the burden was upon the government to prove that such unlawful conspiracy or agreement was entered into by the defendants within the period of three years next prior to the 24th of November, 1905, and if the evidence fails to satisfy the jury, beyond a reasonable doubt, both that such unlawful conspiracy or agreement was entered into by the defendant and Lambert, and that such unlawful agreement or conspiracy was entered into within the three-year period prior to the 24th of November, 1905, it was their duty to acquit him.

If it be conceded that the twentieth request was objectionable in the employment of the term "without a new agreement or conspiracy," yet the other requests were not subject to that criticism. The substantive effect of them was that, unless the jury should find that the conspiracy or agreement charged in the indictment was entered into and the overt acts thereunder were committed more than three years before the finding of the indictment, or unless the jury should find beyond a reasonable doubt that both the unlawful conspiracy and the overt acts thereunder were entered into and committed more than three years before the indictment, they should acquit the defendant. The attention of the court was thus directly invited by these requests to the applicability of the statute of limitations to this case. As heretofore shown in this discussion, the general charge given by the court did not in substance or effect cover either of these requests or express any substantive equivalent therefor, but left the jury without any thought in their mind even of the existence of the statute of limitations or the necessity of finding any renewal or continuation of the original conspiracy or joint participating acts of the conspirators mentioned in the majority opinion of the court. Mr. Justice Story, in *Livingston v. Maryland Insurance Company*, 7 Cranch 506-544, 3 L. Ed. 421, discussing the proposition that a party is entitled to a direct declaration upon a distinct phase of the case, said:

"If in point of law the plaintiffs were entitled to such direction, the court erred in its refusal, although the direction afterwards given by the court might, by inference and argument, in the opinion of this court, be pressed to the same extent. For the party has the right to a direct and positive instruction, and the jury are not to be left to believe in distinctions where none exist, or to reconcile propositions by mere argument and in-

ference. It would be a dangerous practice, and tend to mislead instead of enlightening a jury."

Thompson, in his work on Charging the Jury (section 78), approves this rule, for it is instinct with justice and fair play. *Cahn v. Reid et al.*, 18 Mo. App. 115, 135, 136.

As the charge of the court in respect of the McKibben entries and the purpose for which it was admitted, commented on in this opinion, were excepted to, and error assigned thereon, the judgment, in my opinion, should be reversed for the palpable error committed therein; and I am of opinion that the cause should be reversed for the refusal of the court to give the nineteenth and twenty-first requests for instructions asked by the defendant below, and for its failure in its charge, directly or indirectly, to advise the jury of the statute of limitations applicable to this case, and for not even submitting to them the question of fact as to whether there was any evidence of a renewal of the conspiracy or any joint participating acts of the parties in subsequent overt acts, from which the existence of the fact of its renewal could be inferred.

No hardship results to the government from the foregoing views. Statutes of limitation are statutes of repose and peace. They are favored by the law, not only because they give repose and security to title to property, but because they give protection as well to the life and liberty of the citizen. If the government desires to prosecute such offender as Ware for his alleged continued frauds committed upon the government in thwarting its public land laws, he is liable to prosecution every time he does the forbidden act in pursuance thereof, either by himself or through another acting as his agent or instrument, if such act be not barred by the three-year statute of limitations. But if the government, in order to inflict upon him the severer penalty under the conspiracy statute, does not or did not avail itself of its right to prosecute when the offense was committed by the overt act within three years thereafter, it is its own fault, and, if not discovered until after the three-year limitation, it is sufficient to say that the law prefers to protect the citizen against the severer punishment after the lapse of such a length of time, when the evidence, perhaps, has been lost, the witnesses are inaccessible, leaving the government its right to proceed against the offender independent of the conspiracy statute.

In other respects, I concur in the opinion of the majority.

NOTE.

Commencement of Period of Limitations Against Prosecutions for Continuing Offenses.

I. IN GENERAL.

[a] (U. S. 1878) An indictment charged that B. demanded of defendant a sum of money, which he, as her agent and attorney, had collected and received from the United States on account of a pension awarded to her, and that he then, and continuously thereafter, wrongfully withheld it from her. *Held*, that the crime charged was not a continuous one, so as to prevent the running of limitations against it.—*United States v. Irvine*, 98 U. S. 450, 25 L. Ed. 193.

[b] (Ark. 1877) The offense of bigamy is barred, under the statute, by the lapse of three years from the date of the bigamous marriage, the offense being complete upon the second marriage, subsequent cohabitation not entering into it or rendering it a continuing offense.—*Scoggins v. State*, 32 Ark. 205.

[c] (Iowa, 1880) Under Code, § 4009, providing that, "If any person who has a former husband or wife living marry another person, or continue to cohabit with such second husband or wife, in this state, he or she is guilty of bigamy," cohabitation after a bigamous marriage, contracted here or elsewhere, is sufficient to constitute the crime; and, where such cohabitation continues until the indictment is found, the fact that the marriage was contracted more than three years before will not bar the prosecution.—*State v. Sloan*, 55 Iowa, 217, 7 N. W. 516.

[d] (Mo. 1880) A prosecution for obstructing a public road may be begun after two years from the putting up of the fence which constitutes the obstruction, if the fence remained up to the time of indictment filed.—*State v. Gilbert*, 73 Mo. 20.

[e] (N. Y. 1897) The limitation of time for the finding of an indictment for the seduction under promise of marriage of a female of previous chaste character, fixed by Pen. Code, § 285, begins to run from the first act of illicit intercourse between the parties after the female was able to comprehend its enormity, though at the time she was under the age of consent.—*People v. Nelson*, 153 N. Y. 90, 46 N. E. 1040, 60 Am. St. Rep. 592.

[f] (N. C. 1886) The statute requiring prosecutions for misdemeanors to be commenced within two years after the commission of the offense does not bar an indictment for maintaining a public nuisance in obstructing a public highway, though the obstruction was placed in the highway more than two years prior to the finding of the indictment, because the nuisance was a continuous one.—*State v. Long*, 94 N. C. 806.

[g] (N. C. 1904) Persons who, as employes of another, place posts in a waterway, constituting a nuisance, may not, 12 years after they have ceased to be in his service, be convicted of maintaining the nuisance.—*State v. Poyner*, 134 N. C. 609, 46 S. E. 500.

[h] (Pa.) The limitation of Cr. Proc. Act 1860, § 77, is a bar to a prosecution for bigamy after two years from the second marriage, although cohabitation under it continued until within two years of the prosecution.—(1874) *Commonwealth v. McNerny*, 10 Phila. 206, 6 Leg. Gaz. 183; (1876) *Glise v. Commonwealth*, 81 Pa. (31 P. F. Smith) 428, 2 Wkly. Notes Cas. 589, 33 Leg. Int. 257, reversing (1876) 11 Phila. 655, 23 Pittsb. Leg. J. 138, 23 Leg. Int. 102.

[i] (Tenn. 1873) A prosecution for maintaining a nuisance, which had existed for 18 years before the presentment of the indictment, is not barred by limitation, since the continuance of the nuisance is a new offense.—*Nashville & D. R. Co. v. State*, 60 Tenn. (1 Baxt.) 55.

[j] (W. Va. 1901) An indictment for obstruction of a public road will not be barred by limitation, though such obstruction began more than a year before the indictment, provided it was continued within such year, as every day's continuance of it is a new offense.—*State v. Dry Fork R. Co.*, 50 W. Va. 235, 40 S. E. 447.

II. CONSPIRACY TO COMMIT CRIME.

[a] (U. S. 1907) A prosecution for conspiracy to defraud the United States under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], is maintainable if instituted within three years of the commission of the last overt act.—*Bradford v. United States*, 152 Fed. 617, 81 C. C. A. 607.

[b] (U. S. 1887) The crime defined in Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], prescribing punishment "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, and one or more of such parties do any act to effect the object of the conspiracy," is composed of the conspiracy and an act done in pursuance thereof; and, as soon as the one is formed and the other committed, the crime is consummated, and the statute of limitations begins to run against a prosecution therefor. Subsequent acts committed pursuant to the conspiracy do not render it a continuing crime.—*United States v. Owen* (D. C.) 32 Fed. 534.

[c] (U. S. 1895) A conspiracy to defraud the United States by making unlawful entries of public lands cannot, for the purpose of avoiding the statute of limitations, be split up into different conspiracies for each section of land entered or for each overt act done; nor can it be held that there is a new conspiracy by the parties to the original conspiracy, whenever a new party is brought into the scheme, so as to make the statute of limitations begin to run from that time.—*United States v. McCord* (D. C.) 72 Fed. 159.

[d] (U. S. 1905) An overt act being necessary to sustain a prosecution for conspiracy to defraud the United States, under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], the statute of limitations does not begin to run against such a prosecution until the commission of an overt act; and since every such overt act is a renewal of the conspiracy, a prosecution may be instituted within three years after the commission of any overt act, although more than that length of time may have elapsed since the conspiracy was first formed or the first of such acts was committed thereunder.—*United States v. Bradford* (C. C.) 148 Fed. 413.

[e] (U. S. 1906) Where an alleged conspiracy to defraud the United States out of public lands was formed in September, 1902, and the necessary affidavits to consummate the fraud were filed on the 7th and 8th of October, 1902, the filing of such affidavits constituted an overt act, which started limitations against a prosecution for conspiracy, which was barred on October 8, 1905, under Rev. St. § 1044 [U. S. Comp. St. 1901, p. 725], limiting prosecutions for federal offenses to three years after the offense shall have been committed.—*Ex parte Black* (D. C.) 147 Fed. 832.

[f] (U. S. 1907) The crime denounced by Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], providing that, if two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner, and one of them does an act to effect the object of the conspiracy, all shall be liable to a penalty, etc., consists in putting a corrupt agreement into active operation, and hence limitations run from the date of the last overt act committed for the purpose of completing the object of the conspiracy.—*United States v. Brace* (D. C.) 149 Fed. 874.

[g] (D. C. 1904) Where a conspiracy is formed and a single overt act in aid of its object is committed beyond the statutory period of limitation before the finding of the indictment and subsequent overt acts are committed within that period, then, through the repetition of such acts, the conspiracy is made a continuing offense, and by each of such acts it is repeated and entered into anew, and the prosecution is not barred.—*Lorenz v. United States*, 24 App. D. C. 337.

[h] (Ill. 1888) Limitations do not commence to run against a prosecution for conspiring to obtain money by false pretenses until the commission of the last overt act in furtherance of the conspiracy.—*Ochs v. People*, 124 Ill. 399, 16 N. E. 662.

[i] (N. Y. 1898) The statute of limitations is no bar to a prosecution for conspiracy, although the corrupt agreement took place at a date barred by the statute, where the crime continued in active operation as to overt acts within such time.—*People v. Willis*, 23 Misc. Rep. 568, 52 N. Y. Supp. 808.

[j] (Pa. 1876) Where defendants were charged with conspiracy to deceive the insurance commissioner of Philadelphia, the statute of limitations does not begin to run until the end of the conspiracy.—*Commonwealth v. Wishart*, 8 Leg. Gaz. 137.

[k] (Pa. 1877) A count, after charging a conspiracy to cheat, without laying it within the statutory period, charged a series of fraudulent acts in pursuance thereof, some of which were laid within two years from the finding of the bill. *Held*, that the prosecution was barred by the statute of limitations.—*Commonwealth v. Bartilson*, 85 Pa. 482.

(156 Fed. 961.)

VANDIVER v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. November 11, 1907.)

No. 3 (1,856).

1. CUSTOMS DUTIES—APPEAL FROM GENERAL APPRAISERS—CONCLUSIVENESS OF FINDINGS.

Findings of the Board of General Appraisers, unless unsupported or against the weight of evidence, or additional evidence has been taken, will not be disturbed by the courts on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs Duties, § 205.]

2. SAME—DECISION BY COLLECTOR OF CUSTOMS—PRESUMPTION OF CORRECTNESS.

The classification by a collector of customs of imported goods under a tariff law is presumably correct.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

There was no opinion below. The Circuit Court affirmed a decision of the Board of United States General Appraisers, which had affirmed the assessment of duty by the collector of customs at the port of Philadelphia. The subject of the controversy consisted of sulphur, which was shown by chemical analysis to contain in one instance .0015 per cent. of nonvolatile impurities, and in another instance .00437 per cent. of ash.

S. Morris Waln, for the importer.

Jasper Yeates Brinton, Asst. U. S. Atty., and J. Whitaker Thompson, U. S. Atty.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. The appellant, John L. Vandiver, imported certain sulphur and contended it was dutiable under paragraph 674 of the tariff act (Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1688]), viz.:

"Sulphur, lac or precipitated, and sulphur of brimstone, crude, in bulk, sulphur ore as pyrites, or sulphuret of iron in its natural state, containing in excess of twenty-five per centum of sulphur, and sulphur not otherwise provided for."

The collector classified it as refined sulphur, under paragraph 84, viz.:

"Sulphur, refined or sublimed, or flowers of, eight dollars per ton."

On appeal by Vandiver, the Board of General Appraisers, and thereafter the Circuit Court, approved the collector's action. The case turns on the question whether this sulphur was refined. Being invoiced by the shipper as "refined roll sulphur," it would seem the burden was on the importer to show the importation was not refined, as thus invoiced. The General Appraisers, after referring to the large mass of testimony, state that:

"A careful consideration of it strengthens the opinion that the sulphur is not crude, but is in fact refined."

We are of opinion the court below committed no error in adopting this view. The presumption was that the collector's classification was

correct. *Pickhardt v. United States*, 67 Fed. 111, 14 C. C. A. 341. And the collector's classification was supported by the findings of the Board of Appraisers. These findings, unless unsupported, against the weight of the evidence, or where additional evidence is before the court, will not be disturbed on appeal. *Apgar v. United States*, 78 Fed. 332, 24 C. C. A. 113; *In re Van Blankensteyn*, 56 Fed. 475, 5 C. C. A. 579.

The evidence warranted the Board's finding, and the appeal is therefore dismissed.

(157 Fed. 19.)

HAMILTON COUNTY v. MONTPELIER SAVINGS BANK & TRUST CO.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1907. Rehearing Denied November 19, 1907.)

No. 1,349.

1. COUNTIES—FUNDING BONDS—CONSTITUTIONAL LIMITATION OF INDEBTEDNESS.

Const. Ill. 1870, art. 9, § 12, which limits the amount of indebtedness which may be lawfully contracted by any municipality to 5 per cent. of the value of the taxable property therein, relates solely to the creation of indebtedness thereafter, and neither authorizes repudiation, nor affects the making of terms for payment of existing legal liabilities: hence the funding of such liabilities by a county, authorized by statute and vote, was unaffected by the limitation, and the fact alone that funding bonds issued for that purpose, reciting that "binding, subsisting legal obligations of said county" were thereby funded exceeded such limitation, neither implies nor amounts to a violation of the constitutional provision which can only be made to appear by impeaching such recital as to the validity of the indebtedness funded.

2. SAME—RECITALS IN BONDS—EFFECT AS ESTOPPEL.

Rev. St. Ill. 1881, c. 113, authorizes counties and other municipalities to issue bonds for the purpose of retiring outstanding obligations. A county had an outstanding issue of bonds. After years of litigation in both state and federal courts the liability of the county was established in favor of the holders of a majority of such bonds, and judgments entered against it thereon, while other portions of the issue had been adjudged invalid, and the holders defeated. Others of the bonds were in the hands of holders whose rights had not been adjudicated. In such state of facts a compromise was effected, pursuant to which the county voted to issue funding bonds under such statute, to be used in settlement of the judgments and the outstanding unadjudicated bonds, and they were so used: judgments being entered on the unadjudicated bonds by consent, and all judgments satisfied in exchange for the funding bonds. Such bonds recited that they were issued under such statute, and that "binding, subsisting legal obligations of said county" were thereby funded. *Held* that, under the statute, the county officers, authorized thereto by a vote of the electors, had power to make the compromise, and for that purpose to determine on behalf of the county that the unadjudicated outstanding bonds were valid and subsisting obligations, and that their recital of such fact estopped the county as against a bona fide holder for value of the funding bonds to deny their validity, on the ground that all or any part of the obligations thereby retired were invalid, either on constitutional or statutory grounds.

In Error to the Circuit Court of the United States for the Eastern District of Illinois.

The judgment against county of Hamilton is in assumpsit, for recovery upon so-called "funding bonds," issued by the county, and held by the Montpelier Savings Bank & Trust Company, the plaintiff below. These bonds were issued under the provision of a general act of the Legislature of Illinois, mention-

ed in the bonds—being chapter 113, Rev. St. 1881; 3 Starr & C. Ann. Ill. St. par. 1, c. 113—authorizing issuance of bonds by municipalities for the purpose of funding and retiring outstanding obligations, and pursuant to a vote of the people for such issue. They were in the following form, except that the numbering and times of payment were various:

"United States of America, State of Illinois.

No. 85

County of Hamilton,

\$1000.

"Funding Bond, Issued under Act of 1865.

"As amended April 27th, 1877 & June 4th, 1879.

"Third Class.

"Seven years after date, for value received, the county of Hamilton promises to pay to the bearer hereof the sum of one thousand dollars, in lawful money of the United States, at the American Exchange National Bank in the city of New York with interest at the rate of $4\frac{1}{2}$ per cent. per annum, payable January and July as shown by and upon the surrender of the annexed coupons as they severally become due, except the last coupon which is due with the bond.

"This bond is issued for the purpose of funding and retiring certain binding, subsisting legal obligations of said county, which remain outstanding and unpaid under the provisions of an act of the General Assembly of the state of Illinois, entitled 'An act to enable counties, cities, towns, townships, school districts and other municipal corporations to fund, retire and purchase their outstanding bonds and other evidences of indebtedness, and to provide for the registration of new bonds or other evidences of indebtedness in the office of the Auditor of Public Accounts,' approved February 13th, 1865 (Pub. Laws 1865, p. 44), and acts amendatory thereto, approved April 27th, 1877 (Laws 1877, p. 158), and June 4th, 1879 (Laws 1879, p. 229), and in pursuance of the vote of a majority of the legal voters of said county, voting at an election duly called under said act, and notified, held, and conducted according to the laws of said state.

"We hereby certify that all the requirements of said acts and laws have been fully complied with in the issue hereof.

"In testimony whereof, we, the undersigned officers of the said county, being duly authorized to execute this obligation on its behalf, have hereunto set our signatures this first day of August, A. D. 1898.

"W. J. Sayers,

"Frank Lockett,

Chairman, Board of Supervisors.

"[Seal.] Clerk."

On reverse of bond:

"Auditor's Office, Illinois, Springfield, Sept. 2, 1898.

"I, James S. McCullough, Auditor of Public Accounts of the state of Illinois, do hereby certify that the within bond has been registered in this office this day pursuant to the provisions of an act entitled 'An act to enable counties, cities, towns, townships, school districts and other municipal corporations to fund, retire and purchase their outstanding bonds and other evidences of indebtedness, and to provide for the registration of new bonds, or other evidences of indebtedness, in the office of the Auditor of Public Accounts,' approved February 13, 1865, and acts amendatory thereto, approved April 27, 1877, and June 4, 1879.

"I further certify that the aggregate equalized valuations of property assessed for taxation in said county for the year 1897 were certified to this office as follows: Real estate, \$1,297,229.00; personal property, \$330,447.00.

"In testimony whereof, I have hereunto subscribed my name, and affixed the seal of my office, the day and year aforesaid.

"J. S. McCullough,

"[Seal.]

Auditor Public Accounts."

The record is voluminous with facts in reference to the alleged indebtedness for which these funding bonds were issued, litigation over the pre-existing bonds, and circumstances attending the refunding transaction. In the brief submitted on behalf of the county of Hamilton the ultimate facts are recited,

upon which the various contentions rest for reversal of the judgment, and the following summary is deemed sufficient for the purposes of review: In 1868 the county of Hamilton voted to subscribe \$200,000 to the capital stock of the Shawneetown branch of the Illinois Central Railroad Company and to issue bonds for that amount in payment thereof. This railroad was not built, and in 1869 the Legislature of Illinois passed an act incorporating the St. Louis & Southeastern Railway Company to run through that county, and authorized the county, without further vote, to issue the bonds theretofore voted in payment of a subscription by the county for \$200,000 of stock of the new company. In 1871 bonds to the amount of \$200,000 (being 200 bonds of \$1,000 each) were so issued. In 1881, one Walter M. Jackson obtained a decree against said county under a cross-bill filed by him in an action then pending in the federal court for the Southern District of Illinois, that he was the holder for value of 105 of the above-mentioned bonds with coupons attached, and that they were adjudged valid, legal, and binding obligations of the county. In 1887 proceedings were had in a state court to stop the levy of taxes for payment of interest on these bonds, and the judgment of the county court granting such relief was subsequently affirmed by the Supreme Court of Illinois in *People ex rel. v. Hamill*, 134 Ill. 666, 17 N. E. 799, 29 N. E. 280. Subsequently, one Post sued the county in the federal court upon interest coupons attached to such issue of bonds, all but six of the bonds having been adjudicated as valid under the above-mentioned Jackson decree. This case afterwards proceeded in the name of Austin, as administrator for Post, and on writ of error from the judgment of the Circuit Court therein in favor of the bondholder was brought to this court, and was here affirmed as to the bonds covered by the Jackson decree, but in reference to the six bonds not thus covered the county was relieved from liability upon the authority of the above-mentioned Hamill case. *Austin, Administrator, v. Hamilton Co.*, 76 Fed. 208, 22 C. C. A. 128. Again, in the case of *Zane v. Hamilton Co.*, 104 Fed. 63, 43 C. C. A. 416, other like bonds, not within the Jackson decree, were alike adjudged to be invalid, and the Supreme Court (189 U. S. 370, 23 Sup. Ct. 538, 47 L. Ed. 858) afterwards affirmed such decision. In 1894, two judgments were recovered in the federal court against said county upon bonds included in the prior Jackson decree, one in favor of Walter M. Jackson for \$52,200.88, and the other in favor of Edward H. Shepard for \$103,509.95. In 1893 one Bowles recovered in the same court a judgment against the county upon interest coupons attached to bonds of this issue. In 1898, Thomas C. Mather, as attorney for Jackson and Shepard and other bondholders, entered into negotiation with the county board of Hamilton county for settlement of the indebtedness claimed under the entire bond issue above mentioned. And thereupon the county board called an election to submit to a vote of the people a proposition to issue funding bonds bearing interest at 4½ per cent. to take up the old bonds at these rates: That all bonds covered by the Jackson decree, above mentioned, be taken up at par, with accrued interest, and the remaining bonds, not so covered, at 55 per cent. of the principal and accrued interest. It was agreed by Mather, who controlled all of the old bonds except five or six, to accept such new bonds in lieu thereof. This preliminary agreement was made in writing between the supervisors and Mr. Mather, and among other terms it was provided that the judgments theretofore obtained should be satisfied upon the completion of such arrangement: and on behalf of the county board it was further stipulated as to all bonds not covered by the Jackson decree, and not otherwise in judgment against the county, that judgment be entered against the county thereupon, and to that end that the county would have appearance entered in suits thereupon and jury waived. In conformity with this arrangement an election was held, and the issue authorized by a vote of 1,059 in favor thereof, and 483 against the issue. "At its meeting held July 27, 1898, the board, after declaring the proposition carried, passed a resolution instructing that there be prepared 280 bonds of the county, in accordance with the form prescribed therefor by the Auditor of Public Accounts, and that such bonds be executed by the chairman of the board and the clerk, with the seal of the county, and delivered to said Mather upon his compliance with the terms of his said contract with the county. On August 27, 1898, the board, at a special meeting, passed a resolution directing that the chairman and clerk of the board, and I. H. Webb, be ap-

pointed on behalf of the county to go to Springfield and take sufficient of the new bonds for the purpose of funding and retiring, or selling, and with the proceeds retiring the said \$200,000 bond issue of 1871, and with said bonds to carry out on behalf of the county the terms of the said agreement between said Mather and the county; and that in carrying out said agreement they should deliver the necessary amount of bonds to said Mather under said contract. Said Webb was further authorized, as attorney for the county, to waive service of process in the United States Circuit Court, and to enter the county's appearance in any suits to be commenced in said court on any of said \$200,000 bond issue, and to waive a jury, and consent to entry of judgment thereon against the county, according to the terms of said contract with Mather." The representatives so authorized carried the new bonds, bearing date August 1, 1898, to Springfield, and delivered the 266 bonds of the county to Mather, pursuant to the arrangement, and the bonds so delivered were purchased by Farson, Leach & Co., and by them sold to the defendant in error, and are the bonds in controversy. In connection with the visit of these representatives of the county to Springfield, the representatives caused appearances to be entered on the part of the county to suits then filed for recovery upon the bonds not theretofore adjudicated against the county, and judgment was entered accordingly in favor of Edward D. Shepard for \$101,393.48. All judgments against the county in these matters were satisfied of record upon the delivery of the bonds as above mentioned. The county paid interest on these bonds up to 1905, and paid \$84,000 of principal which matured prior to that year, but thereafter refused to make further payments. Upon the trial under the issues, the court directed, and the jury rendered, a verdict against the county, upon which the judgment was entered. Error is assigned for various alleged causes (numbering 52), but specification is not deemed needful, as the general discussion in the opinion is applicable to all.

Samuel Alschuler, for plaintiff in error.

Chester B. Masslich, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The funding bonds upon which this judgment rests are alike in form, recitals, statutory authority, and procedure for issuance, with those involved in *Graves v. Saline County*, 161 U. S. 359, 16 Sup. Ct. 526, 40 L. Ed. 732, which were upheld as "valid and binding obligations" of the county, in the hands of a bona fide holder for value. That case arose upon a bill filed by the county to enjoin collection and payment of interest upon the funding bonds, wherein the bondholder intervened, and decree passed in favor of the county. On appeal to this court, three questions were certified to the Supreme Court, upon facts stated, namely: (1) Whether the county was estopped by the recitals in the funding bonds to assert that the original bonds so funded "were not binding, subsisting legal obligations of said county;" (2) whether the funding bonds were binding obligations in the hands of the bona fide holder; (3) and if not valid, whether relief under the bill could be conditioned upon payment by the county of the amount of certain valid bonds which were included in the exchange. In the opinion of the Supreme Court thereupon, the second question only was answered and in the affirmative, with the remark that "this renders a formal answer to the other questions unnecessary." The present action, however, is at law, and, under the issues tendered and raised by pleadings and testimony, the judgment can be upheld only upon the ground that the county is estopped, as against the bona fide purchaser of the bonds for value, from setting up the invalidity, in whole or in part, of the alleged

indebtedness for which the funding bonds were voted and issued. So, the Saline County Case does not expressly meet the question thus arising of the force of recitals in such funding bonds; but it is clearly applicable for interpretation of the funding statute and proceedings thereunder, and is instructive in reference to the recitals.

The matters relied upon to defeat recovery, stated in various forms in several pleas, may be summarized in these propositions: (1) That the entire issue of original bonds, amounting to \$200,000, constituting the sole basis and consideration for the funding bonds in suit, was unauthorized and void, as theretofore "finally and conclusively adjudged;" (2) that all of such bonds were included in the funding arrangement, so that alleged prior adjudications upholding the validity of a portion (\$105,000) of the original issue, in the hands of one Jackson, as purchaser thereof, were without force, in any view, to authorize or validate the funding bonds thus issued; and (3) that both original and funding issues were in excess of the limit of municipal indebtedness fixed by the constitutional provision (1870) of Illinois. Each of the defenses thus plead and tendered, was (in effect) excluded by the trial court in directing a verdict for the plaintiff below, and, if the county is entitled to interpose either of these matters as a defense, error is well assigned.

The contentions for estoppel, in support of the judgment, are twofold: First, under the recitals in the bonds and the vote authorizing the funding settlement; and, second, through final judgments against the county for the entire indebtedness thus recognized and settled. Both grounds are distinctly raised by various forms of averment in the declaration, with the facts in reference to the judgments undisputed, and the only material controversies of fact in the record, bearing upon one or the other proposition of estoppel, are deductions sought under each in two instances of conceded or undisputed circumstances. One relates to the issue of bona fides in the purchase of the bonds, and is thus applicable to the question of estoppel by recitals therein, which can arise only in favor of one who derives ownership through purchase for value, without notice of defects or invalidity; while the other relates to the nature and standing of the last judgment obtained of the several judgments upon which the second claim of estoppel is predicated. The theory upon which the challenge of bona fides rests involves the general doctrine of the force of recitals, so that it may best be considered in that connection, rather than preliminarily; and the theory as to the character of the ultimate judgment which accompanied the settlement, if tenable in any view, is without bearing upon that doctrine.

The funding bonds in controversy were issued in purported compromise and settlement of pre-existing indebtedness of the county, upon action of the county authorities and vote of the people, in purported conformity with legislative authority to that end, recited in the bonds—namely, the Illinois funding bond act of 1865, as amended in 1877 and 1879 (chapter 113, Rev. St. 1881; 3 Starr & C. Ann. Ill. St. c. 113); and the validity of this statute is well recognized, and its interpretation unquestionable. *Graves v. Saline County*, supra. Each bond recites that it "is issued for the purpose of funding and re-

tiring certain binding, subsisting legal obligations of said county, which remain outstanding and unpaid," and "in pursuance of the vote of a majority of the legal voters of said county," at an election called and conducted according to law; and further certifies "that all the requirements of said acts and laws have been fully complied with in the issue hereof."

These primary facts thereupon are undisputed: That bonds of the county were outstanding and unpaid, exceeding the funding issue, with final adjudications of liability upon the major portion thereof unsatisfied, when a compromise and funding arrangement was negotiated; that such arrangement was duly submitted to a vote of the people, and a large majority voted for the issue of funding bonds accordingly; and that the bonds in question were issued and sold, and proceeds applied in conformity with such arrangement and vote. Nevertheless, with the good faith of the transactions unchallenged, impeachment is now sought of the plain recitals in the bonds, that "subsisting legal obligations of said county" were thus funded and settled, to defeat recovery in the hands of this holder, who purchased the bonds in the market, before due, for value. The alleged defenses to that end are reducible to two contentions, under which all questions raised on behalf of the county may be fully considered (without pursuing the order of discussion in the briefs), namely: First, that the funding bonds are invalid per se, because the amount voted and issued exceeded the limit fixed by the Constitution of Illinois for incurring municipal indebtedness; second, that the original bond issue thereby settled was invalid for want of municipal power to contract such indebtedness, because (1) the enabling act was not in conformity with a constitutional requirement, and (2) the issue exceeded the constitutional limit.

1. The first-mentioned inquiry is within narrow compass, free from complication of law or fact, as it involves alone the question whether the mere issuance of funding bonds in excess of the 5 per cent. limitation violates the constitutional provision referred to, irrespective of the status of pre-existing municipal indebtedness thereby funded. The further contention that the original issue of bonds thus funded was subject to and infringed the limitation, which is pressed in the argument of counsel as involved in such inquiry, is plainly beyond its scope, as both votes of the people for the funding issue and recitals in the bonds are presumptive of an existing indebtedness, lawfully incurred; so that this primary contention, that the limitation is directly applicable, upon the face of the funding transaction, must rest upon the terms of the limitation, with the truth of these recitals uncontroverted. If the limitation thus applies to the funding transaction, irrespective of the assumed validity of the indebtedness when incurred, the funding bonds are plainly invalid, without reference to bona fides on the part of the purchaser and municipal authorities. Not only was sufficient information disclosed therein to charge the purchaser with notice that the issue exceeded such limit, but knowledge in fact is conceded, and recovery would be prohibited, in such view, under either line of authorities cited upon this point. But the question whether the validity of the consideration—the original bonds—is subject to challenge rests upon evidence not disclosed in the new bonds, nor involved

in the present inquiry, and arises only under the second proposition above stated.

The Illinois Constitution, adopted in 1870 (section 12, art. 9), forbids municipalities "to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes, previous to the incurring of such indebtedness"; with proviso that it shall not apply to bonds issued in compliance with vote of the people prior to its adoption. Were the issue of bonds in controversy not a funding issue, their date (1898) would be conclusive of violation of this provision. It was, however, a funding transaction, as recited in the bonds and voted by the people, and thus upon its face created no indebtedness—presumptively, under the action of the people and express recitals in the bonds, was a mere change in form and terms of payment of prior obligations of the county, lawfully incurred. As stated in *County of Jasper v. Ballou*, 103 U. S. 745, 753, 26 L. Ed. 422, in reference to a like transaction, "the issue of the funding bonds did not increase the aggregate of the indebtedness of the corporation, but only changed its form." The constitutional limitation relates solely to the creation of indebtedness thereafter, and neither authorizes repudiation, nor affects the making of terms for payment of existing legal liabilities. The funding of such liabilities, therefore, authorized by statute and vote, was unaffected by the limitation, and the fact alone that the issue of funding bonds thereupon exceeded that limit neither implies nor amounts to violation of the constitutional provision. *County of Jasper v. Ballou*, supra; *City of Huron v. Second Ward Sav. Bank*, 86 Fed. 272, 278, 30 C. C. A. 38, 45, 49 L. R. A. 534, and cases cited; *Hughes County v. Livingston*, 104 Fed. 306, 317, 43 C. C. A. 541. So, without impeachment of the recitals, that "binding, subsisting legal obligations of said county" were thereby funded, no infringement of the Constitution appears in this issue of bonds. Whether the validity of the obligations so funded is contestable for like cause or upon other alleged grounds, as against the defendant in error, remains to be considered.

2. Upon the conceded state of facts in reference to the original issue of bonds and various adjudications of liability thereunder, a funding arrangement of the outstanding obligations of the county was both needful and authorized by the above-mentioned statute. After years of litigation, in state and federal courts, with conflicting adjudications in the former as to the validity of that bond issue, the liability of the county was established in favor of the holders of a majority of such bonds, while other portions of the bonds so issued had been adjudged invalid and holders defeated of recovery; other large portions were in the hands of various holders unadjudicated as to such parties, when the funding issue was voted. Thus the occasion for an adjustment of the unpaid judgments against the county, and unsettled claims and differences in a funding arrangement, was clearly presented; and the issue of funding bonds thereupon was authorized by vote of the people, as required by the statute. The contention, therefore, that no funding arrangement was within the power of the municipality is plainly un-

tenable, for the reason that it ignores the effect of the judgments above mentioned in favor of the bondholders. It rests alone upon the proposition that the entire bond issue thereby funded was void, both (1) for insufficiency of the enabling act, under which the bonds were issued, as expressly determined in *People ex rel. v. Hamill*, 134 Ill. 666, 17 N. E. 799, 29 N. E. 280, and (2) for excess of the constitutional limit. The judgments referred to were conclusive against either of these grounds of defense in respect of the bonds involved therein—and of the validity of such bonds—under the elementary doctrine of *res judicata* (*Cromwell v. County of Sac*, 94 U. S. 351, 352, 24 L. Ed. 195; 9 Notes U. S. Rep. 93; 23 Cyc. 1215), and thus established an indebtedness for which funding bonds were authorized; excluding from the present view the judgment ultimately obtained in favor of the holders of the residue of unadjudicated bonds, which was entered subsequent to the vote for funding. It is further contended that indebtedness under judgments is not within the terms of the legislative provision for an issue of funding bonds, but such objection is clearly untenable, as it was expressly met and overruled in *Stone v. City of Chicago*, 207 Ill. 492, 69 N. E. 970; and other pertinent authorities of like effect do not require citation. Whatever defense was then available against the holders of the old bonds related only to those upon which no recovery had been adjudged; and (in so far as materiality may now appear) the record discloses that the first above-mentioned ground of defense was not only available in respect thereof, when the funding transaction was voted upon, but had repeatedly been upheld in adjudications. The funding arrangement, however, extended to a compromise of these outstanding bonds not adjudicated for or against the individual holders, together with the amounts allowed to bondholders who had recovered judgments; and this fact raises the crucial question: Are the funding bonds issued thereupon subject to either of the above-mentioned challenges, in the case at bar, because the outstanding bonds so included were impeachable when funded? The solution rests upon the force of the recitals in these bonds, and is free from doubt, as we believe, under the authorities.

The rule is well recognized that municipal bonds must contain recitals showing authority for their issuance to make them marketable, as no indebtedness can be contracted by the municipality, unless (1) the Legislature has granted power to that end, and (2) all contingencies are met, as provided by Constitution or statute for its exercise. Recitals are of no avail to cure the want of fundamental power to issue bonds, but they are needful and commonly made to save the purchaser from examination and proof in respect of the contingencies of fact upon which a grant of power was exercised; and upon this distinction in their legitimate office and bearing must their force be determined. When power appears, however, to issue bonds for the purpose stated, and defense is sought, through violation of Constitution or statute in its exercise—in exceeding the limit of indebtedness or like restrictions of the grant—such departure from the power has given rise to difficulty in ascertaining the true line of distinction and just effect of recitals in bonds so issued; and it may be conceded that the authorities have not been harmonious in stating

the rule applicable in such cases, particularly when a constitutional provision is violated. Thus, in the opinion cited for plaintiff in error, in *Hedges v. Dixon County*, 150 U. S. 182, 187, 14 Sup. Ct. 71, 37 L. Ed. 1044, it is remarked, in substance, on reference to the prior *Lake County* cases (130 U. S. 662, 9 Sup. Ct. 651, 32 L. Ed. 1060; 130 U. S. 674, 9 Sup. Ct. 654, 32 L. Ed. 1065; and 147 U. S. 230, 13 Sup. Ct. 318, 37 L. Ed. 145), that recitals in bonds may estop against denial of legislative authority, but no such estoppel can arise when a constitutional provision is violated. Nevertheless, later decisions of the Supreme Court have, as we believe, set aside the exception from the elementary doctrine of estoppel above indicated, and upheld and established the rule as equally applicable to recitals of fact, within the knowledge of the municipality, and necessarily committed to its proper officers to ascertain and certify, as to a constitutional limit of indebtedness or like restrictive provisions upon the exercise of the power. *Gunnison County Commissioners v. Rollins*, 173 U. S. 255, 263, 19 Sup. Ct. 390, 43 L. Ed. 689; and authorities there reviewed; *Waite v. Santa Cruz*, 184 U. S. 302, 320, 22 Sup. Ct. 327, 46 L. Ed. 552; and, in this court, *Wesson v. Saline Co.*, 73 Fed. 917, 920, 20 C. C. A. 229, and *Wesson v. Town of Mt. Vernon*, 98 Fed. 804, 807, 39 C. C. A. 301; *King v. City of Superior*, 117 Fed. 113, 115, 54 C. C. A. 499. So the fact alone that defense is sought for violation of a constitutional provision, instead of a legislative requirement, in the issue of bonds, is insufficient, under these controlling authorities, to avoid such estoppel from recitals of fact thereupon in the bonds. It goes without saying that the Constitution is paramount in all its provisions, and the statutory grant, which is the direct source of municipal authority, must conform to such provisions; that Constitution and statute are alike binding upon the municipality and those claiming under it; that transactions on its part, in derogation of the authority thus conferred, are without validity as to parties or privies; and that the sovereign source of municipal power may, in clear terms, provide against recovery, through estoppel by recitals or otherwise, upon bonds so issued, even in the hands of the bona fide purchaser under such restraint of authority. But the present inquiry is not within either of these premises, and the defenses set up can be upheld only upon the broad ground that the nature of the alleged violation of Constitution and statute prevents estoppel by recitals in the bond, and that the bona fide purchaser was bound to take notice of the facts constituting the violation.

The statutory authority, as before mentioned, was to fund the indebtedness of the county, outstanding in bonds or other obligations, "which are the binding, subsisting legal obligations of such county," with new bonds to be issued by "the proper corporate authorities," when such arrangement was authorized by vote of the people. This power became operative for funding, as both of the conditions precedent were in existence—an indebtedness in legal obligations to be funded and an affirmative vote for funding. For exercise of the power the character and amount of the various obligations must be ascertained, and necessarily by the corporate authorities referred to,

in the absence of other provisions. *Waite v. Santa Cruz*, 184 U. S. 302, 320, 22 Sup. Ct. 327, 46 L. Ed. 552. In such case—as pertinently said in *Dixon Co. v. Field*, 111 U. S. 83, 93, 4 Sup. Ct. 315, 28 L. Ed. 360, and quoted with approval in *Gunnison Co. Commissioners v. Rollins* (page 264 of 173 U. S., page 390 of 19 Sup. Ct. [43 L. Ed. 689]), *supra*—“the meaning of the law granting power to issue the bonds is that they may be issued, not upon the existence of certain facts, to be ascertained and determined whenever disputed, but upon the ascertainment and determination of their existence, by the officers or body designated by law to issue the bonds upon such contingency”; and their determination and recital thereupon are “conclusive of the fact and binding upon the municipality.” The county authorities determined the character and amount of legal obligations for this funding issue, their finding was ratified by the vote thereupon, and the bonds were issued with express recital of fact in conformity with such finding. If any portion of the original bonds so funded were open to defense for invalidity—either for want of competent statutory authority for the issuance, or for exceeding the constitutional limit, if the limitation were applicable under the vote for such issue—it was only the outstanding portion for which no judgment had then been recovered; and the fact that such questions were then involved in nowise appears from the recitals. That the purchaser was not bound to examine the records for such particulars, under the recitals, is settled (*Evansville v. Dennett*, 161 U. S. 434, 443, 16 Sup. Ct. 613, 40 L. Ed. 760; *Waite v. Santa Cruz*, 184 U. S. 302, 317, 22 Sup. Ct. 327, 46 L. Ed. 552); and, under the above-stated doctrine applicable to such recitals, we believe it to be equally well settled that this purchaser was entitled to assume that the county authorities performed their duty, ascertained all the facts upon which liability depended—necessarily including the inquiries of fact upon which the applicability of the constitutional limitation depended—and that no obligations entered into the funding issue which were not so established as a valid indebtedness. The testimony is clear and undisputed that he purchased the bonds in suit, for value, relying upon their recitals, and with no information to raise doubt of their truthfulness.

We are satisfied that the recitals were within the authority conferred upon the county officers, who executed and issued the bonds, and are sufficient to support the direction of verdict and judgment for recovery. The judgment, accordingly, is affirmed.

(157 Fed. 29.)

CASTAGNINO et al. v. MUTUAL RESERVE FUND LIFE ASS'N et al.

(Circuit Court of Appeals, Sixth Circuit. November 20, 1907.)

No. 1,678.

INSURANCE—SUIT FOR CONSTRUCTION OF LIFE POLICY—JURISDICTION TO GRANT RELIEF AGAINST FOREIGN COMPANY.

Where a life insurance company incorporated under the laws of one state has subjected itself to suit in another state in which it does business, has agreed in accordance with its laws that service of process may be made upon the insurance commissioner of such state, and has issued policies to its citizens, such a policy holder has the right to maintain a suit against it in his own state in either the state or federal courts for a construction of his policy and a determination of his rights thereunder and the legality of acts of the company as bearing thereon, and such right may not be denied on the ground that such a suit is an interference with the internal management of a foreign corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 33.]

Appeal from the Circuit Court of the United States for the Western District of Tennessee.

The bill was filed against the Mutual Reserve Fund Life Association and its successor, the Mutual Reserve Life Insurance Company, to interpret and enforce a contract in the form of a policy or certificate of insurance issued by the defendant corporations for \$5,000 on the life of Emanuel Castagnino, in favor of the other plaintiff, his wife. The Mutual Reserve Fund Life Association was incorporated under the laws of New York, February 9, 1881, and reincorporated December 23, 1883. It accepted the provisions of the insurance laws of New York of 1892, and received an amended charter February 25, 1902; its name being then changed to the Mutual Reserve Life Insurance Company. The present policy was issued August 31, 1888, when the plaintiff Castagnino was 43 years old, and after the Mutual Reserve Fund Life Association had accepted the provisions of the law of Tennessee authorizing the service of process on the insurance commissioner of that state. It was issued, as usual in such cases, in consideration of the application and its statements, and the payment of the admission fee, of the annual dues for expenses, and all mortuary premiums, payable at the home office in New York City, within 30 days from the first week day of February, April, June, August, October, and December, of every year during the continuance of the policy, and subject to all the provisions, requirements, and benefits stated in the policy, which were made a part of the contract, and are set out in an exhibit to the bill. The plaintiffs claim that the dues for expenses were fixed at the sum of \$15 for each year, and that the defendants, before the delivery of the policy, established the amounts to be paid for the mortuary premium every two months during its existence, and that the plaintiffs have paid such amounts for the expenses and for mortuary premiums during the existence of the policy and up to the present time.

The policy contains certain provisions respecting the reserve or emergency fund, the organization of the so-called mortuary department of the association, and the contract between the association and the Central Trust Company of New York, and states that the policy contains a certificate that the association had deposited with such trust company, as a reserve or emergency fund, on March 31, 1888, the amount of \$1,463,283.38, of which \$1,024,500 was in bonds, and \$86,672.78 in cash. According to the policy 25 per cent. of the net receipts of the mortuary premiums during a period of 15 years from the date of the policy was to be added to the reserve or emergency fund, which should be properly invested and the interest placed to the credit of the death fund. It was further provided that the reserve fund above \$100,000 should be applied to the payment of claims in excess of the actuaries' table of mortality, and to make up any deficiency that might exist in the death fund, when any claim by death was due after the mortuary premium call. The policy

further provided that the annual mortuary premiums after the policy had been in force 15 years from date should not include any further contribution to the reserve or emergency fund, nor should the net amount of such annual mortuary premium thereafter exceed the annual premiums required by the actuaries' table of mortality, or the actual mortality experience of the association. At the expiration of said 15 years, there should be credited to the policy the equitable proportion of the total surplus or reserve fund accumulation, and also the equitable share of such reserve or emergency fund accumulation contributed by members whose policies had terminated. The amount thus accumulated to the credit of the reserve or emergency fund might be distributed at the option of the policy holders, either as a tontine accumulation payable in cash, or be used as cash toward the payment of future dues and mortuary premiums.

When the policy was delivered, the association had a local manager and agent in Tennessee. He was afterwards withdrawn, and the plaintiff was compelled to pay his annual dues and mortuary premiums or assessments upon the policy at the home office in New York City. When the policy was delivered, the plaintiff paid an admission fee of \$20, and the annual dues for expenses of \$15, and was informed and believed that a certain sum was fixed by the policy for the mortuary premiums to be paid every two months during the existence of the policy. The policy fixed the mortuary premium at \$12.90, payable in each of the six months named, or \$77.40 a year. The plaintiff paid these premiums at that rate until 1889, when they were increased to \$13.35. They remained at that sum during the years 1889, 1890, 1891, 1892, 1893, and 1894, and up to the month of August, 1895. At that time the executive committee of the association, under the pretext that policies of this class were not paying for the insurance provided, unlawfully and arbitrarily increased the mortuary premiums from \$13.35 to \$15.05, every two months, or \$106.30 per annum, and collected the premiums at that rate during the rest of the year 1895 and the years 1896 and 1897, up to March, 1898. Beginning with March, 1898, the premiums were increased from \$17.05 to \$26.40 (or \$158.40 per annum), for the years 1898 and 1899, up to December. In that month the mortuary call was increased to \$30.15 (or \$180.90 per annum). This lasted until February, 1900, when the premium was increased to \$32.05 (or \$192.30 per annum). In April, 1901, the premium was increased to \$33.90, at which amount it continued up to and including the month of February, 1902. During this time the defendant made three special assessments, each for \$33.90, one in July, one in September, and one in December, 1901, so that the total mortuary premiums for 1901 amounted to \$305.10. Beginning with the month of February, 1902, the association increased the mortuary premiums to \$37.65, and this rate lasted up to February, 1903. Beginning with that month, the mortuary premium was increased to \$41.40 (or \$248.40 per annum), which rate was maintained up to the month of February, 1904. Beginning with April, 1904, the premium was increased to \$45.15. This rate lasted until March 1905. During this time, three special assessments, each for \$45.15, were made, one on September 1, 1904, one on November 1, 1904, and one on February 1, 1905. The amount paid during the year of special assessments, including the latter, was \$406.35. Beginning with March, 1905, the mortuary premium was increased to \$48.90, which continued up to and including March, 1906. During this time, two special assessments, each for \$48.90, were made, one on March 3, 1905, and one on July 1, 1905. During this last year, the mortuary premiums and special assessments amounted to \$391.20. On April 2, 1906, the mortuary premium was raised to \$52.65. This was paid. On June 1, 1906, a call was made for \$52.65, which was not paid to the company owing to this suit, in which the plaintiff prayed that a receiver be appointed and any future calls collected may be held to await the result of the litigation.

The plaintiff insists that these mortuary calls and special assessments were not made in accordance with the provisions of the policy or constitution and by-laws of the association, or of the laws of New York governing that corporation, but arbitrarily and unlawfully made; that they were extortionate and were paid under protest, because of duress, the plaintiff believing the policy would be forfeited if the premiums and assessments were not promptly paid.

After the policy had been in force more than 12 years, namely, on June 15,

1901, the plaintiff was notified by the association that a call had been made by order of the board of directors and the executive committee for the amount of the reserve to the date of the amendment to the by-laws, determined by the actuaries' table of mortality, with interest at 4 per cent. per annum, and that there was due upon the policy under this call \$1,362.80, payable within 30 days from date, which amount, if plaintiff so desired, would be loaned him for the purpose of making payments, upon the security of such insurance. That notice stated that the cause of the call was that it had been determined by the actuaries of the association that the net contributions to the death fund made by the members of the class to which the policy of the plaintiff belonged had been less than the tabular mortality by the actuaries' table of mortality, and less than the rate of mortality experienced, and therefore the assessment was levied for the purpose of providing the reserves which would be required under the contract of insurance. Plaintiff claimed that this call and notice were wholly unauthorized and void; that the plaintiff had paid all he was liable for, and could not be held liable for any sum or assessment on account of any deficiency which was assumed to exist or in fact existed at the date of the assessment, and, as a matter of fact, no such deficiency existed in the reserve fund or in the death fund at that date.

Plaintiff insists that under the policy no annual mortuary premiums after August 31, 1903, being 15 years from the date of the policy, could lawfully include any further contributions to the reserve or emergency fund mentioned in the policy, nor could the net amount of any annual premium be charged after that date against the plaintiff in excess of the annual premiums required by the actuaries' tables of mortality and the actual mortality experienced by the association. For this reason, the plaintiffs say that all the assessments and mortuary premiums since August 31, 1903, are excessive and illegal.

At the end of five years after the issuance of the policy, the plaintiffs were entitled every five years to a bond to be issued on their policy; but this provision has never been complied with, but wholly disregarded. The defendant claims that it had been released by the Legislature of New York from compliance with the terms of the charter, but plaintiff insists that no Legislature has attempted to do this.

The prayer asks: That the defendant be enjoined from making any further calls for mortuary premiums and special assessments, or declaring null and void the policy for nonpayment of mortuary premiums or assessments, or on any other ground, until the further order of the court. That a receiver be appointed to receive and hold, subject to the order of the court, such sums as are or may become due upon the policy pending the suit. That the court construe the policy and determine and fix the rights and interests of the plaintiffs, and the obligations and duties of the defendants, and enforce the same by proper orders and decrees. That an account be taken and stated by and between the plaintiffs and the defendant, and it may be determined in what sum the defendant is indebted to the plaintiffs, and that plaintiffs may have a decree against the defendant for the amount due. That it may be decreed that the defendant had no right to make special or extraordinary assessments, or any assessment above the sum of \$13.35, fixed in the policy. That the sums collected by mortuary calls or special assessments, in excess of the annual dues and mortuary premiums collected, may be ascertained, and the plaintiffs have a decree against the defendant for the same. That it may be decreed that the defendant had no right on or after August 31, 1903, to include any further contributions to the reserve or emergency fund. That all sums collected after August 31, 1903, on account of mortuary premiums or special assessments, may be found and decreed to be owing and due from the defendants. That the equitable proportion due the plaintiffs on August 31, 1903, at the end of 15 years from the date of the policy, be ascertained, and a proper decree of the same made. That the special assessment made June 1, 1901, for the sum of \$1,368.80, under which this charge was made a lien upon the policy, be declared to have been done illegally and without authority, and that the charge and assessment be canceled and held for naught. That the mortuary calls of June 1, 1906, and the succeeding monthly calls after such date, be held to be without authority and illegal.

If the relief specifically prayed for be not granted, and the policy is to be

interpreted as contended by the association, the plaintiffs pray that the court may find and decree that the plaintiffs were induced by fraud to accept the policy and to submit to the demands and exactions of the defendants, and for these reasons the policy be held void, and that the court decree that the sums be repaid to the plaintiff with interest.

A copy of the constitution and by-laws of the association, and also of the various laws of New York governing it, do not appear in the bill; but it is averred that the defendant has them in its possession and can produce them if required or if necessary.

The defendant demurred to the bill on 10 grounds. The demurrer was sustained evidently upon the ground that the court could not grant the prayer of the bill without interfering with the internal management, administration, and control of a foreign corporation, and therefore had no jurisdiction in the premises. In a brief opinion the court cited and followed the following cases: *Taylor v. Mutual Reserve*, 97 Va. 60, 33 S. E. 385, 45 L. R. A. 621; *Howard v. Mutual Reserve*, 125 N. C. 49, 34 S. E. 199, 45 L. R. A. 853; *Condon v. Mutual Reserve*, 89 Md. 99, 42 Atl. 944, 44 L. R. A. 149, 73 Am. St. Rep. 169; *Clark v. Mutual Reserve*, 14 App. D. C. 154, 43 L. R. A. 390; *Gaines v. Sup. Council Royal Arc. (C. C.)* 140 Fed. 978; *Gault v. Mutual Reserve (C. C.)* 121 Fed. 403.

Wm. M. Randolph, George Randolph, and Wassell Randolph, for appellants.

T. B. Turley, E. R. Turley, and John D. Martin, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge (after stating the facts as above). If the cases cited by the court below were decided rightly, the demurrer was properly sustained, and the judgment should be affirmed. The present case therefore turns upon the strength of the rule promulgated in those cases. The leading ones, the *Clark*, from the District of Columbia, the *Condon* from Maryland, the *Taylor* from Virginia, and the *Howard* from North Carolina, were all decided about the same time, in 1899, following the decision in the *Clark Case*. Two other cases, the *Gault* and the *Gaines Cases*, were decided by the United States district judges in Tennessee, and appeared to have no original force. They simply followed the others. The leading cases referred to were all attempts, by suits in equity, to enjoin the collection of illegal assessments, and to recover them back, and relief was denied on the ground that the court of a state other than the state of the insurance company could not exercise jurisdiction to inquire into the internal management and administration of a mutual life insurance company, because that was beyond its reach, and it could not make its order effective in the way of punishing or correcting either the officers of the corporation or the corporation itself, if it should find there had been a dereliction of duty.

Later than these are the cases of *Strauss*, *Ebert*, and *Benjamin*. *Strauss v. Mutual Reserve, etc., Ass'n*, 126 N. C. 971, 36 S. E. 352, 54 L. R. A. 605, 83 Am. St. Rep. 699; *Ebert v. Mutual Reserve, etc., Ass'n*, 81 Minn. 116, 83 N. W. 506, 834, 84 N. W. 457; and *Benjamin v. Mutual Reserve, etc., Ass'n*, 146 Cal. 34, 79 Pac. 517. The *Strauss* and *Ebert Cases* were suits to recover damages for the wrongful cancellation of certain policies of this company. The *Benjamin Case* was a suit to recover back certain illegal assessments which were made and collected. The cases were not different essentially from

that at bar. In each the court was required to construe the constitution, by-laws, and policy, the fundamental law of the association, and determine therefrom whether certain assessments were or were not valid. That is what the plaintiffs below seek, and that is what the court below held they could not secure, except in New York. Some of the courts which declined to take jurisdiction seemed alarmed at the possibility of confusion if every state in which the insurance company did business should entertain suits to construe and enforce its policies. It seems to us, however, it would be easier for the far-away litigants to have that matter handled at their homes, rather than take a trip to New York and hire a lawyer there for the same purpose. A citizen who takes a policy in Tennessee in a New York company, after the company had agreed that service of process in Tennessee might be made upon the insurance commissioner of that state, has reason to believe that he or his beneficiaries, if the company fails to treat them rightfully, will have a ready resort to the courts of Tennessee for redress. It is not necessary to take the view that, in order to construe and enforce a policy, there must be an interference with the internal management of the company. The internal management will go on as before, and there will be no interference with the constitution and by-laws or with the lawful authority of the officers of the corporation. In construing a policy it is not necessary to interfere with the proper discretion of the officers. Where there is discretion, the officers will be allowed full range; it is only where there is no discretion, and the act is clearly unauthorized and wrong, that the law will interfere. In the cases to which we have referred, one in North Carolina, one in Minnesota, and one in California, it was necessary to construe the policy in connection with what the company had done, as shown by the insurance reports of New York. But the matter was entirely simple. There was no attempt to entrench upon the rights or the authority of the officers. What they did was plain, and the law was plain, and there was no reason why the court of the state where the policy holder lived and the insurance was written and the contract made should not take jurisdiction of the suits that resulted. If all this applies to the courts of the states, much more does it apply to the courts of the United States.

The judgment is reversed, and the case remanded for further proceedings.

(157 Fed. 33.)

QUINLAN v. GREEN COUNTY, KY.

(Circuit Court of Appeals, Sixth Circuit. December 19, 1907.)

No. 1,440.

1. COUNTIES—CONDITIONS PRECEDENT TO ISSUE OF BONDS—PRESUMPTION AS TO PERFORMANCE.

A judge of a county court in Kentucky, acting under statutory authority, called a special election to determine whether or not the county should subscribe for a certain amount of the stock of a railroad company and issue its negotiable bonds for the amount, the subscription to be subject to certain stated conditions, one of which was that it should not be made

nor the bonds issued "until said county * * * is fully and completely exonerated from the payment of the capital stock voted by said county and authorized to be subscribed" to another railroad company. The proposition having been carried, the judge subsequently entered an order reciting that, "the court being sufficiently advised," the bonds should issue, and they were thereupon issued and delivered, and the stock received by the county. At that time some years had elapsed since the county voted to subscribe to the stock of the other railroad company, and the clerk had been authorized to make the subscription, but no further steps had been taken to that end. *Held*, in an action against the county by a bona fide holder of bonds so issued, that the presumption arising from the subscription and issuance of the bonds, and the order of the judge authorizing the same, the condition precedent had been fulfilled, and the county exonerated from liability on account of its prior subscription was not overcome but was strengthened, where, although more than 30 years had elapsed, no contract completing such subscription had ever been made or demanded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1943.]

2. SAME—CONDITION OR COVENANT—BONDS IN AID OF RAILROAD.

Where a proposition adopted by a vote of a county to subscribe for stock of a railroad company, to aid in the construction of its proposed road and to issue negotiable bonds of the county therefor, contained a provision that the subscription should be on condition that the company should locate and construct its road through the county, and should expend the amount subscribed within the limits of the county, such provision did not create a condition precedent to the issuance of the bonds, but the acceptance of the subscription imposed an obligation on the company to perform the condition subsequently, the failure to fully comply with which would not invalidate the bonds in the hands of a bona fide holder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1987.]

3. CONTRACTS—CONSTRUCTION—CONDITIONS PRECEDENT.

The question whether the performance of a stipulation in a contract is a condition precedent to the performance of other stipulations in it depends upon the order in which the parties intend the several stipulations to be performed. The calling of a provision or stipulation a condition is not conclusive, and if from the contract or other circumstances it is seen that it was not the intention of the parties that its performance should be a condition precedent it will not be held to be such.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 1015.]

4. MUNICIPAL CORPORATIONS—BONDS—PRESUMPTION OF VALIDITY—ABSENCE OF RECITALS.

The absence of a recital in municipal bonds that the conditions to their issue have been complied with does not deprive them of their character of negotiable instruments, nor of the benefit of the ordinary presumptions which attend such instruments.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1956.]

Lurton, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Western District of Kentucky.

This is an action brought by the plaintiff in error to recover the contents of certain bonds and coupons alleged to have been issued by the defendant in error in 1872, in payment, with other like bonds, for shares of stock of the Cumberland & Ohio Railroad Company. The plaintiff claims to be the holder for value and owner of the bonds and coupons which are the subject of the controversy. By stipulation, the case was tried by the court without a jury. The court made a finding of facts, and declared its conclusion of law thereon.

The result of its conclusion was that the plaintiff was not entitled to recover, and judgment was entered accordingly. The plaintiff thereupon sued out this writ of error.

By an act of the Legislature of Kentucky, passed February 24, 1869, the above-named railroad company was incorporated and authorized to construct a railroad from a point on the Ohio river to a point on the boundary line between Kentucky and Tennessee. Acts of Kentucky 1869, vol. 1, p. 463, c. 1578. In the course of its authorized route was Green county, the defendant in this suit. With a view, apparently, to enable the counties along its route to aid the railroad company in the construction of its road, authority for that purpose was conferred by the act as follows: "Sec. 15. That any city, town or county through which said proposed road shall pass is hereby authorized to subscribe stock in said railroad company in any amount any such city, town, or county may desire; and that the county court of any such county is authorized to issue the bonds of their respective counties in such amount as the county court may direct; and the chairman and board of trustees, or mayor and aldermen of any town, and the mayor and aldermen or council of any city, are hereby authorized to issue the bonds of their respective towns or cities in like manner. All said bonds shall be payable to bearer, with coupons attached, bearing any rate of interest not exceeding six per cent. per annum, payable semi-annually in the city of New York, payable at such times as they may designate, not exceeding thirty years from date; but before any such subscription on the part of the city, town or county shall be valid or binding on the same, the mayor and aldermen, or chairman and board of trustees of any town, the mayor and aldermen or council of any city, and the county court of any county having jurisdiction, shall submit the question of any such subscription to the qualified voters of such city, town or county in which the proposed subscription is made, at such time or times as said chairman and board of trustees, or mayor and aldermen of any town, mayor and aldermen or council of any city, or the county court of any county, as aforesaid, may, by order, direct; and should a majority of the qualified voters voting at any such election vote in favor of subscribing said stock in said railroad company, it shall be the duty of such county court, trustees, or other authorities aforesaid, to make the subscription in the name of their respective cities, towns or counties, as the case may be, and proceed to have issued the bonds to the amount of such subscription as hereinbefore directed." And it was further provided that the application for such proceedings might be made to the judge of the county court instead of the court; whereupon he was vested with the same power. And the railroad company was authorized to "receive subscriptions of stock to their company by individuals, towns, cities, counties, or other corporations, whether payable in money or other things, with such terms and times of payment, conditions annexed, and kind of payment that may be set forth in the subscription."

On June 17, 1869, upon the request of the commissioners of the railroad company, above named, the judge of the county court entered the order following:

"Present, Thos. R. Barnett, Judge.

"Whereas the Commissioners of the Cumberland & Ohio Railroad Company, by virtue of the authority delegated to them by the charter of said company, have requested the county court of Green county to order an election in the said county of Green, and to submit to the qualified voters of said county the question whether said county court shall subscribe for and on behalf of said county, two hundred and fifty thousand dollars to the capital stock of the Cumberland & Ohio Railroad Company and payable in the bonds of said county, having twenty years to run, and bearing six per cent. interest from date, and upon condition that said company shall locate and construct said railroad through the said county of Green, and within one mile of the town of Greensburg, in said county, and shall expend the amount so subscribed within the limits of Green county; and also upon the further condition that said bonds shall not be issued or said county pay any part of the principal or interest on said amount subscribed to said Cumberland & Ohio Railroad Company, until said county of Green is fully and completely exonerated from the payment of the capital stock voted by said county, and authorized to be subscribed by said

Green county court to the Elizabethtown & Tennessee Railroad or any part of the interest thereon. It is therefore ordered by the court that an election by the qualified votes of Green county, at the voting places in said county, be held and conducted by the several officers as prescribed by law for holding elections on the third day of July, 1869, to vote on the question as to whether or not the said county court shall, for, and on behalf of said county subscribe two hundred and fifty thousand dollars to the capital stock of the said Cumberland & Ohio Railroad conditioned and to be paid, as above stated."

The election was held. The vote was in favor of the proposition and was so properly certified. Thereafterwards, and on June 3, 1870, the county judge made an order, wherein after reciting the proceedings above recited, he says: "I * * * do hereby subscribe for two hundred and fifty thousand dollars of the capital stock of the said Cumberland & Ohio Railroad Company for and on behalf of said county of Green, which subscription is to be paid in the bonds of said county as prescribed in said order of submission, and this subscription is made with the conditions set out in the order of this court ordering said election and now of record in the office of this county." On October 12, 1871, the county judge ordered the bonds to be printed. The bonds, of which these in suit were a part, were issued and delivered to the railroad company during the succeeding year, 1872, the bulk of them on or about August 15th, on which day the county judge made the following order:

"Present, Thos. R. Barnett, Judge.

"Application was this day made to the presiding judge of the county court of Green county, by the president and board of directors of the Cumberland & Ohio Railroad Company to issue the balance of the bonds of said county to the amount of the subscription of said county of Green to said Cumberland & Ohio Railroad Company, and the court being sufficiently advised. It is ordered by the court that the balance of said bonds be and they are hereby ordered to be issued, the same to be signed by the judge of said county court of Green county, and countersigned by the clerk of said court, as required by the charter of said company."

Thereupon the \$250,000.00 of the capital stock of the railroad company was delivered to the county, which has since been retained and owned by it. For a time the county raised by tax and paid the interest accruing on the bonds, but thereafter it refused to recognize their validity, and refused to make further payment. The plaintiff is the bona fide holder for value of the bonds and coupons in suit, but had notice that the railroad had not been built further than from the north line of said county to Greensburg, which is about one-quarter of the way through the county. As to this latter fact, it may be noted in this connection that only \$150,000 of the proceeds of the bonds had been expended by the Cumberland & Ohio Railroad Company in the construction of the road, and this was on that part of the road north of Greensburg. This expenditure did not complete that portion of the road, but it was completed by the Louisville & Nashville Railroad Company under the stipulation in a lease to it of its road by the Cumberland & Ohio Railroad Company, but at what cost does not appear. In respect to the conditions of the subscription for stock to pay which these bonds were voted, the facts were these: In 1868 at an election in Green county it had been voted to subscribe for \$300,000 of the stock of the Elizabethtown & Tennessee Railroad Company, to be paid for in the bonds of the county. Upon making a record of this election the county court made the following order: "It is now therefore ordered that the clerk of this court, for and on behalf of the county of Green, make said subscription on the terms specified in the order submitting the question to a vote as aforesaid." But nothing further was ever done in regard to such a subscription either by the county or the Elizabethtown & Tennessee Railroad Company. No stock was issued to the county or bonds issued to the railroad company. Some further incidental facts will be hereafter mentioned in the opinion in the discussion of the questions involved in the controversy. The bonds in suit, except the numbers given to each bond and the amount therein specified, were in the form following:

"United States of America, county of Green, \$500.00. State of Kentucky.
For the Cumberland & Ohio Railroad.

"Twenty years after date, the county of Green, in the state of Kentucky,

will pay to the holder of this bond the sum of five hundred dollars with interest thereon at the rate of six per cent. per annum, payable semi-annually upon presentation of the proper coupons hereto attached, for the principal and interest being payable at the bank of America, in the city of New York.

"In testimony whereof, the judge of said county of Green has hereunto set his hand and affixed the seal of said county, on the first day of April, A. D. 1871, and caused the same to be attested by the county clerk, who has also signed the coupons hereto attached.

"[Green county seal.]

T. R. Barnett, Judge.
"D. T. Towles, Clerk."

The conclusion of law by the court below was "that the plaintiff is not entitled to recover, because the conditions upon which the subscription for the capital stock of the Cumberland & Ohio Railroad Company was made, and upon which the bonds sued on were issued, have not been performed or complied with."

George Du Relle and E. F. Trabue, for plaintiff in error.

Ernest Macpherson, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge (after stating the facts as above). The questions to be decided upon the facts found, the substance of which has been stated, and the proper inferences to be drawn therefrom, are these: First, whether it should be held that the county of Green had been exonerated from the payment of the subscription for the capital stock of the Elizabethtown & Tennessee Railroad Company; and, second, whether these bonds are invalid in the hands of the plaintiff by reason of the fact that only \$150,000 of the proceeds of the bonds have been expended in the construction of the road in Green county, or by reason of the fact that the same has not been built through the county. These questions turn largely upon the proper interpretation of the so-called conditions upon which the county authorized these bonds to be issued.

Upon our conference after the original argument in this court, we were in doubt upon some of the questions presented for decision, and certified them to the Supreme Court for its opinion. One—the first of the questions—as that court thought, involved too many points. But we requested that if that question should be deemed too broad, then that the court should advise us whether, "Assuming the facts to be as found, was a bona fide purchaser, before maturity of these bonds and coupons for value, entitled to assume in his purchase that Green county had, before their issuance, been fully and completely exonerated from the payment of the capital stock subscribed for by the county court of said county for and in behalf of said county to the Elizabethtown & Tennessee Railroad Company?" The Supreme Court answered this question as follows: "Construing the second question to inquire not whether there is conclusive presumption, but whether on the facts found there is any presumption at all that the county had been exonerated from its former subscription to another railroad, we answer, Yes." *Quinlan v. Green County*, 205 U. S. 410, 27 Sup. Ct. 505, 51 L. Ed. 860. On receiving this answer, we heard further argument upon the consequences of the opinion given by the Supreme Court as well as upon the question of the character of the

other so-called conditions, about which the Supreme Court expressed no opinion.

We agree that the exoneration of Green county from any liability on account of its former subscription to another railroad was a condition precedent to the issuance of the bonds, and that without the accomplishment of this condition the plaintiff cannot recover. We concede this, although we cannot help thinking that there is room for the belief that the Legislature of Kentucky intended that the county judge should determine when and whether the condition had been accomplished, and that to hold otherwise is to suppose that these bonds, although they were by the terms of the statute to be negotiable coupon bonds, would, although issued and put upon the market, yet be clogged with doubt of their validity, a doubt which even now might be and still is urged against them. Such bonds would not be marketable, and their purpose would be utterly defeated. For this reason it has sometimes been held that, although the statute does not expressly nominate any officer who is to pass upon the execution of the condition precedent to the issue of such bonds, yet that, in view of the consequences, an implication might arise that the Legislature intended that the officer of the municipality in whose behalf he was acting, and who was charged with the custody and the issuance of the bonds, should, before delivering them, ascertain and determine whether the condition had been complied with. Especially would this be so when the question whether there had been a compliance is one which calls for the exercise of judgment upon facts with which he would be most conversant. It is true that in most of these cases, perhaps in all, there were recitals in the bonds of the regularity of the anterior proceedings or the fulfillment of conditions precedent; but it would seem that for other reasons, if it is intended by the statute that the determination of the fact is committed to the official who issues the bonds, such determination ought to settle the fact. If in such conditions the bonds should be issued without such determination, the question would be open. But here the county judge acted advisedly. In the order that the bonds be issued, he recites that he was sufficiently advised—borrowing an expression from legal procedure—to denote that he had taken notice of and considered the question whether the conditions existed which authorized the issuance of the bonds; in other words, that he had exercised the function devolved upon him. Granting, what must be regarded as settled by authority, that when the condition consists of a distinct and indubitable fact, and nothing is left to the judgment of the official charged with the delivery of the bonds, his delivery of them without the occurrence of the condition would be unauthorized and the bonds be void, yet it would seem upon principle, that if the question whether the condition has been accomplished is one of doubt and uncertainty, and it is apparent that the officer who has charge of the issuance of the bonds is to determine the fact of compliance with the condition, his determination would conclude the question, and, if in the affirmative, bind the county. This is, as we understand, the doctrine on which the judgment of the Supreme Court in *Provident Trust Co.*

v. Mercer County; 170 U. S. 593, 604, 18 Sup. Ct. 788, 42 L. Ed. 1156, was finally rested. But without pursuing that subject further, we are of opinion that, upon other grounds, the question whether Green county was exonerated from the obligations of the former vote should be determined in the affirmative. We may say in passing that there seems to be grave reasons for doubting whether Green county ever came under an obligation to the Elizabethtown & Tennessee Railroad Company. The subscription was voted, and the county court ordered its clerk to subscribe for the stock. But that was all. The clerk did not subscribe. No bonds were ever issued, and no stock was ever delivered or tendered to the county. In *Bates County v. Winters*, 112 U. S. 325, 5 Sup. Ct. 157, 28 L. Ed. 744, Chief Justice Waite, after referring to previous cases, summed up the rule as follows:

"The rule may be stated thus: An actual manual subscription on the books of a railroad company is not indispensably necessary to bind a municipality as a subscriber to the capital stock. If the body or agency having authority to make such a subscription passes an ordinance or resolution to the effect that it does thereby, in the name and behalf of the municipality, subscribe a specified amount of stock, and presents a copy of that resolution to the company for acceptance as a subscription, and the company does, in fact, accept, and notifies the municipality, or its proper agent, to that effect, the contract of subscription is complete, and binds the parties according to its terms."

This is a careful and undoubtedly correct statement of the law upon the subject. See, also, *Morawetz on Corp.* §§ 61, 134; *Greene v. Sigua Iron Co.*, 88 Fed. 203, 31 C. C. A. 458. The county judge might well have thought that as there had been no complete subscription by an actual subscription, and by the acceptance and notification of the railroad company, the county was exonerated from its vote to authorize the proposed subscription. The language of the condition is that the county shall be "exonerated from the payment of the capital stock voted by said county and authorized to be subscribed by said Green county court to the Elizabethtown & Tennessee Railroad." This does not import that a completed subscription had been made, but only that a subscription had been authorized by the former vote; and the county would be exonerated if the subscription which it had authorized was not completed so as to bind the county. These bonds were not issued until four years after the vote of the county authorizing the subscription for stock of the Elizabethtown & Tennessee Railroad Company had been taken and recorded. Meantime, this latter company had given no token of its acceptance, and the county had taken no further step after the direction of the county court to its clerk to make the subscription upon the terms specified in the order submitting the question to a vote. And the subscription was never completed. What more complete exoneration from its former vote could the county of Green have? But, to return to the line of reasoning which we were intending to pursue, we are advised by the answer of the Supreme Court that there was, upon the facts found, a presumption in favor of the bonds that the county had been exonerated from the vote to subscribe to the other railroad stock; not a conclusive presumption, but one that might be controverted. But there is nothing in the facts found which controvert it. On the con-

trary, the facts confirm the presumption. A long time has elapsed since the vote of the county authorized a subscription to the Elizabethtown & Tennessee Railroad Company's stock, several times the length of time required by any statute of limitations, even supposing there had been a complete agreement for the subscription—and no step had been taken. If it be said that the condition must have existed when the bonds were issued in order to make them valid, and that the lapse of time since is immaterial, the answer is that though in one sense this is true, yet in another sense it is important, for the fact that nothing had since been done by either party upon the footing of the vote is pregnant evidence to show that, when these bonds were issued, neither the county nor the Elizabethtown & Tennessee Railroad Company regarded itself as under any contract relations with the other. It may be that if a formal release was necessary there might be some weight in the suggestion that the trial court has found that no such release was ever given, and that this would controvert the presumption that the county had been exonerated. But, as the Supreme Court said in its opinion, no formal release was necessary. "It [the condition] was completely fulfilled, if from any circumstance it should appear that the county had been effectively relieved from any liability on account of the vote in aid of the Elizabethtown Railroad."

We come then to the question whether the other provisions of the vote on which the bonds in suit were issued, namely, "that said company shall locate and construct said railroad through said county of Green, * * * and shall expend the amount so subscribed within the limits of Green county," were conditions precedent to the issue of the bonds, or were stipulations imposed upon the Cumberland & Ohio Railroad Company by its acceptance of the subscription. The acceptance of a contract or an obligation which also in terms imposes obligations upon the obligee, and whereupon the latter seeks and obtains the benefit of the contract, binds the latter for their performance, although he may not have expressly undertaken to be bound. Bishop on Contracts (2d Ed.) § 203; 1 Parsons on Contracts (9th Ed.) § 13, n. 1; *Storm v. U. S.*, 94 U. S. 76, 24 L. Ed. 42.

The question whether the performance of a stipulation in a contract is a condition precedent to the performance of other stipulations in it depends upon the order in which the parties intend the several stipulations to be performed. The calling of a provision or stipulation a condition is not conclusive, and if from the contract or other circumstances it is seen that it was not the intention of the parties that its performance should be a condition precedent it will not be held to be such. *Stanley v. Colt*, 5 Wall. 119, 18 L. Ed. 502; *Union Stockyards Co. v. Nashville Packing Co.*, 140 Fed. 701, 704, 72 C. C. A. 195; *Sohier v. Trinity Church*, 109 Mass. 1; *Greene v. O'Connor*, 18 R. I. 56, 25 Atl. 692, 19 L. R. A. 262; *Scovill v. McMahon*, 62 Conn. 378, 26 Atl. 479, 21 L. R. A. 58, 36 Am. St. Rep. 350; *Hartung v. Witte*, 59 Wis. 285, 18 N. W. 175. "Conditions have no idiom," said Virgin, Judge, in *Bucksport, etc., R. Co. v. Brewer*, 67 Me. 295. "Whether they are precedent or subsequent is a ques-

tion purely of intent, and the intention must be determined by considering not only the words of the particular clause, but also the language of the whole contract, as well as the nature of the act required and the subject-matter to which it relates." Conditions are not favored, and a provision will not be construed as such unless the intention is clear. 6 Am. & Eng. Ency. of L. 502; *Clapham v. Moyle*, 1 Lev. 155; *Shep. Touch.* 122; *Huff v. Nickerson*, 27 Me. 106. "Where the language of an agreement can be resolved into a covenant," said Bell, Judge, in *Paschall v. Passmore*, 15 Pa. 295, 307, "the judicial inclination is to so construe it; and hence it has resulted that certain features have ever been held essential to the constitution of a condition. In the absence of any of these, it is not permitted to work the destructive effect the law otherwise attributes to it."

The question we are now considering was mentioned, but not passed upon, by the Supreme Court, because it was not included in our request for its opinion. But we think it apparent, for many reasons, that the performance of these conditions, so called, was not intended to be required before the delivery of the bonds. The subscription for the stock of a railroad company by a municipality, and the issue of negotiable bonds in payment therefor for the purpose of providing means to assist in the construction of a railroad within its limits, is a transaction familiar to every one. It is not a transaction whereby the municipality contracts with the company to build a road, but is intended to provide means to assist the company in building it, in consideration of acquiring a part of its stock, and of the expected advantages of the road to the community. The statute of Kentucky under which these bonds were issued indicates very clearly, as we think, that the bonds authorized were expected to be negotiated for the means to use in the construction of the road. It is provided that they shall be payable to the bearer, that they shall have interest coupons attached payable semiannually in the city of New York, and that the bonds shall be payable at a designated time which may be as long as 30 years after their date. They were thus required to possess the attributes of commercial paper adapted to sale in public markets. And the proposition on which the electors of Green county voted followed in all particulars the provisions of the statute. And when it was provided that the company "shall expend the amount so subscribed within Green county," we cannot doubt that what was meant was that the proceeds of those bonds should be so used, and not, as has been suggested, that the company should have expended some other money equal in amount to the bonds. Such a construction as would lead to the result suggested would leave the company without the ready means to build the road which it was the purpose to provide for. Moreover, there is a plain distinction made in the proposition voted in the very terms employed. In regard to the requirements we have been last considering, the question was whether the county would subscribe for the stock and pay for it in county bonds, upon condition that the company should construct its road as mentioned, but where the proposition comes to the matter of the exoneration from the vote to the other railroad, that was expressly made

a condition to the issuance of the bonds or the payment of any part of them. The failure to append this condition to the preceding provisions, and the introduction of the positive inhibition here employed, are persuasive evidence that a distinction was contemplated in the vote. To bear the construction that the former were intended to be conditions precedent, we should need to have the inhibition located in those clauses also. The abrupt change is significant of a difference in purpose.

Other reasons are also suggested by counsel; but we cannot doubt that, for those we have mentioned, the proper construction to be given to the proposition submitted to, and authorized by, the electors of Green county is that the railroad company should, upon its acceptance of the subscription, and the delivery of the stock by one, and of the bonds of the other, come under an obligation to comply with those terms of the proposition voted. And we reach this conclusion without regard to the question of an estoppel arising upon the fact that the county accepted the stock, and has continued to retain it. If the question of the intention were in doubt, the interpretation given by the county to its vote by paying the interest would be persuasive of its understanding at the time of the transaction. We think the bonds were lawfully issued, and that the fact that the company has not performed the stipulations of the agreement which it made as a consideration for the bonds does not invalidate them, when, as appears, the delivery of the bonds was final, and they have passed into the hands of other parties for value, as it was the evident intention of the statute that they would do. We need not inquire whether the county could have made a partial defense against these bonds upon the ground that there had been a partial failure of consideration if the railroad company had held them and were now bringing suit upon them. The holder of negotiable paper is entitled to the benefit of the presumption *prima facie* that he or some previous holder whose title he has acquired is a purchaser in good faith and for value before maturity, in the usual course of business, and without notice of any circumstances impeaching its validity; and that he is the owner thereof, if it is payable to bearer. Daniel on Neg. Inst. § 812. Nothing is here shown to contravene these presumptions. Of course it must always appear that the obligor was competent in law to incur the obligation, and had in fact attempted to incur it. We do not understand that the absence of a recital in municipal bonds that the conditions to their issue have been complied with deprives them of their character of negotiable instruments or of the ordinary presumptions which attend such instruments. Recitals of that character relate to the regularity of the proceedings precedent to their issue, and, if the recitals cover the necessary facts, conclusively establish it. But when, in a case where there are no such recitals, proof is made that the proceedings were in fact regular, the bonds are entitled to the same presumptions in their subsequent negotiation as if they had contained such recitals.

It is suggested that the finding of the court "that the plaintiff is a citizen of the state of New York, and was so when this action was instituted on the 28th day of March, 1899, and that the plaintiff was

the bona fide holder for value of the bonds and coupons sued on, and fully entitled to sue the defendant thereon in this court," was intended only to say that the citizenship of the plaintiff was such as to entitle him to sue in the federal court. But this court, in its question to the Supreme Court, construed this finding to be also a finding that the plaintiff was a bona fide holder for value, and the Supreme Court certainly so construed it as is shown in the statement of facts, and, we have no doubt, correctly. That part of the finding of facts had no relevancy to the question of jurisdiction. If she was a citizen of New York, and was the holder of the bonds, she was entitled to sue. The question of whether she was a bona fide holder for value was a question upon the merits of the case. The phrase which the court below employed was one peculiar to the law of negotiable instruments, and ought to be construed in the sense in which it is there employed. But it really is not material. If, as we hold, the bonds were lawfully issued, the presumptions of law would clothe the plaintiff, if she was the holder, with the character of a bona fide holder for value.

The judgment of the Circuit Court must be reversed, with directions to enter a judgment in favor of the plaintiff for the amount of the bonds and coupons, with interest on the coupons from the time they severally fell due, and interest on the principal of the bonds from the date when the latest coupons thereon severally fell due.

LURTON, Circuit Judge (dissenting). I must in this case, and contrary to the usual practice of this court, express openly the grounds for my dissent to the conclusions reached in this case.

The county has not obtained a road constructed by the company to whose stock it proposed to subscribe. Its money has been thrown away. This suit involves its probable liability upon an issue of bonds aggregating \$250,000. This series of bonds with interest already past due, aggregate three-fourths of a million. For this the county will obtain nothing. To prevent just such a possible result the Legislature provided that subscriptions by counties might be voted conditionally. The conditions which the county demanded were intended to absolutely secure the building of the road. By subtility of construction, upon which I express no opinion, two of these conditions are said now to be only covenants, and, therefore, worthless against an insolvent and nonexistent railway company. For at least 30 years the county has denied its liability, and refused payment of interest. When this denial had been so long acquiesced in that the bonds were purchaseable for little more than the value of wall paper, as stated at the bar, they are acquired by speculators, who now urge that, during all this long, long period of repudiation, the defense of the county has been growing weaker and weaker, and that time, which usually only fortifies a defensive position, has all this time been making bonds valid which were invalid when issued. I will not willingly aid in the destruction of the settled principles which tend to the security of commercial paper. Neither will I agree to strain a finding of facts to hold a county upon obligations which, in my judgment, were never binding either in the forum of law or conscience.

The principal grounds upon which I find myself unable to agree with the court are these:

1. The opinion and conclusion conflicts with the settled views of the Supreme Court in respect to the most important ground upon which it rests. Assuming that the mere fact of issuing these bonds by the county judge was a determination that the conditions had been complied with which authorized their issuance, that determination only raised a presumption in favor of one who should take the bonds before maturity, for value, and without actual notice of the real facts of the case at the date of issuance. This is so because the bonds were without recital. This much was the plain ruling of the Supreme Court in *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138, and *Citizens' Savings Ass'n v. Perry County*, 156 U. S. 692, 15 Sup. Ct. 547, 39 L. Ed. 585. In this very case we certified the question as to the presumption upon which a purchaser before maturity for value might act in purchasing bonds without recital. Referring to the tendency of some of the earlier cases to deny to bonds in the hands of innocent holders any other defense than want of power, the court said that tendency had been "arrested" by the cases I have cited above, which cases it is said held "that the mere facts of subscription to stock and issue of bonds containing no recitals left it open to the obligor to show that a condition precedent had not been fulfilled." "But," added the court, "these cases in no way conflict with the view expressed by Mr. Justice Story in *Pendleton County v. Amy*, 13 Wall. 297, 20 L. Ed. 579, and by Mr. Justice Bradley in *Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579, that a presumption arises from the mere fact of subscription and issue, though not a conclusive one." "Independent of authority such a presumption exists, and is but an instance of the broader presumption that officers charged with the performance of a public duty perform it correctly." My Brethren do not, as I read the opinion of the court, accept this as an applicable rule of law or an authoritative decision in this case. It is, in conclusion of an argument in favor of the conclusiveness of facts, determined by the county judge, refusing the delivery of the bonds here in question, said:

"His delivery of them without the occurrence of the conditions would be unauthorized and the bonds be void, yet it would seem upon principle that if the question whether the conditions had been accomplished is one of doubt and uncertainty, and it is apparent that the officers who had charge of the issuance of the bonds are to determine the fact of compliance with the condition, his determination would conclude the question, and, if in the affirmative, bind the county."

It is evident that the error of the court in the matter I have referred to is, after all, the real ground of the conclusion reached and its judgment colored by the view before expressed.

2. The conclusion is next placed upon the theory that no subscription had ever been made to the capital stock of the Elizabethtown & Tennessee Railroad Company, although one was authorized. It is stated in the opinion that, although the subscription was voted, and the county court ordered its clerk to subscribe for the stock, "the clerk did not so subscribe." It is also said that, when the bonds here involved were issued, the said Elizabethtown & Tennessee Railroad Com-

pany had given no token of its acceptance, and the county had taken no further step after the direction of the county court to its clerk to make the subscription upon the terms specified. Both in this court and in the Supreme Court this case has proceeded upon the theory that a subscription had been made as authorized. The condition precedent presupposes a subscription had been made from which the county was to be released. The defense has been that it was invalid, because the authority had been delegated to the clerk, and that the case of *Mercer, etc., v. Navigation Co.*, 8 Bush (Ky.) 300, was an express authority supporting the county judge's assumption that a subscription so made was void as a delegation of power which could not be delegated. The subsequent case of *Green County v. Shortell*, 116 Ky. 108, 75 S. W. 251, was an action upon some of the same series of bonds here in issue, and the Kentucky court there, assuming that the subscription had been made, distinguished the former case upon the ground that in the former case the clerk or commissioner had a discretion to exercise, while in the case before it he had none, the terms and conditions being settled already. There is no finding that no subscription had ever, in fact, been made by the clerk as directed. The presumption that the clerk, as a public official, correctly discharged his duty ought to stand as well when the presumption operates in favor of the county as it does when its effect is detrimental. The only finding of fact which bears upon the question is the seventeenth. That reads as follows:

"That no formal or express exoneration of said county from the payment of said last-named subscription was ever made or attempted, but nothing further has, up to this date, ever been done, in respect to it, and neither bonds by the county nor stock by the said last-named railroad company have ever been issued or delivered in execution of said orders or under the terms of said subscription."

This finding plainly assumes that there had been a subscription, not a mere authority to subscribe. What is said as to nothing further having been done evidently refers to acts subsequent to the subscription. But it is not important that no formal subscription was made by the clerk. He was commanded to do a purely administrative act, and he could have been coerced to do it by writ of mandamus. The liability of the county upon the vote and the order of the county court was the gist of the matter, and fastened a liability upon the county from which it required exoneration as a condition precedent to another liability.

3. I disagree as to the effect of the lapse of time since these bonds were issued upon their validity. I cannot agree that the liability to this plaintiff rested upon any better foundation when he started this suit in 1899 than if he had sued at date of the earliest maturing coupon. The authority to make a subscription at all depended upon the performance of the antecedent condition of exoneration from liability on account of the former subscription to a different company. Yet within 13 months after the order of the court, directing a subscription by its clerk to the Elizabethtown & Tennessee Railroad Company, we find the county judge making the subscription here involved. If the condition precedent had not been performed then, the act was without authority. In payment of this subscription he issued the bonds in suit

in batches, beginning in January, 1872, and completing the issue in April of the same year. The bonds bear date of April 1, 1871. Now, neither at the date of the subscription, June, 1869, nor at the date of the bonds, April, 1871, nor at the date of their issuance between January and April, 1872, had there been any compliance with the condition in respect of exoneration from the prior liability by the execution of any release, exoneration, or through the judgment of any court. The only finding of fact in respect of this condition is the seventeenth finding of fact set out above. That there had been "no formal or express exoneration" is expressly found. Then upon what facts are we to predicate an exoneration? None are found except the vague statement that "nothing further up to this date [has] ever been done in respect to it, and neither bonds by the county nor stock by the last-named railroad company has ever been issued or delivered in execution of said orders or under the terms of said subscription." The plain meaning is that neither the county nor the railroad company took any further step in pursuance of the subscription. Why? Many reasons may be conjectured. After years of effort to obtain subscriptions enough to carry out the project, the promoters may have become disheartened, and finding themselves unable to comply with the conditions made no issue of shares and no demand of payment of this subscription. But if the lapse of time without demand for payment or tender of stock at the date of the issuance of these bonds was not such as to raise a legal presumption of abandonment or release, the bonds when issued were illegal as having been issued before there had been any release or exoneration, formal or informal, express or implied. If then illegal, when did they become good? If the county could not have defended itself when the bonds were issued against its liability upon the Elizabethtown & Tennessee Railroad subscription, would there have been any pretense that this condition precedent had been complied with? Twenty years went by after the Elizabethtown & Tennessee Railroad subscription was made before this suit was brought. How does it happen that from mere lapse of time a defense, good when these bonds were unlawfully issued and put upon the market, has become ineffectual and the bonds valid, although the applicable evidence then and now is identical? I have given attention to what is said upon this subject by Mr. Justice Moody, who, referring to the determination of the county judge when he issued these bonds that this condition of exoneration had been complied with, said that "the fact that for 38 years no one has made any claim against the county, on account of its supposed liability to subscribe to the stock of the Elizabethtown & Tennessee Railroad, shows conclusively that he was right." But I am unable to regard this as an authoritative point of the opinion. The single question which was answered related only to whether "on the facts found" there was "any presumption" at all that the county had been exonerated. This was answered in the affirmative. It is evident that the court did not mean that a rebuttable presumption of exoneration had become conclusive by lapse of time after the fact of issuance. The effect of the fact that the railroad company had done nothing must, in reason, be limited to the date of the issue of the bonds. If the inquiry is, indeed, whether at this date, 38 years after

the subscription, the county can now be regarded as relieved from liability, I should say "Yes." The lapse of time without an action brought to enforce liability would, undoubtedly, raise a presumption of a release or abandonment. Indeed, the positive statutory limitation of actions would justify a holding that there was no longer an existing liability on account of that subscription. But, if the subsequent lapse of time is to be given effect, then I insist that the conduct of the plaintiff and his predecessors in title, as well as that of the county, must be taken into account. These bonds were dated April, 1871. They matured in 1891. This suit was brought in 1899. The coupons which matured in 1878 and for each year subsequent are sued upon. Thus for more than 21 years the county has refused to pay interest, and for all that time this plaintiff and those from whom he took the bonds have acquiesced in the attitude of the county. Has time been steadily strengthening the claim of the holder and destroying the defense of the county?

4. The question certified assumed that the plaintiff took these bonds before maturity. But the only finding in respect to the status of the plaintiff is the first, in these words:

"The court finds that the plaintiff is a citizen of the state of New York, and was so when this action was instituted on the 28th day of March, 1899, and that the plaintiff was then the bona fide holder for value of the bonds and coupons sued on, and fully entitled to sue the defendant thereon in this court."

That finding, I think, should be interpreted as applying to the plea to the jurisdiction. That plea was, by agreement, submitted with the other defenses. It pleaded that the defendant was not the bona fide owner of these bonds when this suit was brought, March 28, 1899, but that the same bonds and coupons had before been in suit in the same court, and the suit abated because the then plaintiff, Herman H. Heaton, was a fictitious plaintiff; the real owners being citizens of Kentucky, and that Quinlan had acquired the bonds thereafter only for the purpose of giving jurisdiction to the circuit court, the beneficial plaintiffs being citizens of Kentucky. Issue was taken upon this plea as to whether the plaintiff was the real owner or only a fictitious plaintiff. The very terms of the finding indicate that the finding was a response to this plea to the jurisdiction. But if the finding be construed as both a finding in respect to the issue upon jurisdiction and as to the status of the plaintiff as the holder of negotiable paper, it will be most unjust to infer from that finding that the plaintiff acquired these bonds before maturity, as implied by the second interrogatory, or without notice of the defenses of the county. This finding is "that on March 28, 1899," plaintiff was the bona fide holder for value of the bonds and coupons sued upon. That date is the date of the bringing of this suit, and the finding was enough to support his claim of right to sue in a United States court, there being diversity of citizenship.

5. But if the judgment of the Circuit Court, holding that the conditions precedent had not been complied with and that the bonds were invalid, is to be reversed, I think common justice requires that there should be no judgment upon these findings against the county, but a new trial awarded. The findings of fact do not cover all of the issues, and upon those to which they are a response are not definite or

full enough to justify a judgment in favor of the plaintiff. If it is of any moment whether the plaintiff is constructively chargeable with knowledge of the situation when these bonds were issued, then it is important to know whether he took these bonds before maturity, or, if not, whether he has acquired the title of one who did. That he was on March 28, 1899, the bona fide holder for value is too indefinite to justify a judgment for him. The same is true in respect to the defense of the statute of limitations. There is no finding upon this, and it is not permissible to piece out defective findings. An examination of the pleadings will show that a large proportion of the coupons in suit matured prior to 1884. Obviously the defense of the statute of limitation was a good defense to all such coupons, unless the plaintiff can in some way show that it ought not to apply to him. But there is no finding as to this defense. Why shall the county be cut off from the benefit of this defense by refusing to award a new trial and the direction of a judgment upon the bonds and coupons in suit.

When a jury has been waived, and a judgment rendered upon a special finding of facts, this court, if it find that the judgment was erroneous, has the power to direct such judgment to be entered as the special findings require, instead of awarding a new trial. *Fort Scott v. Hickman*, 112 U. S. 150, 5 Sup. Ct. 56, 28 L. Ed. 636. But if the findings are doubtful, obscure, or defective, it is within the power of the court and its high duty, whenever justice seems to require such action, to reverse and remand for a new trial. *Graham v. Bayne*, 18 How. 60, 15 L. Ed. 265; *Flanders v. Tweed*, 9 Wall. 425, 19 L. Ed. 678, 680; *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, 104, 13 Sup. Ct. 485, 37 L. Ed. 380; *Ward v. Cochran*, 150 U. S. 597, 608, 14 Sup. Ct. 230, 37 L. Ed. 1195. No judgment ought to be rendered when the findings are silent as to a fact which is essential to a judgment. An imperfect finding like an imperfect special verdict cannot be pieced out. The burden is upon him who asks a judgment to produce a finding of every fact necessary to support it. *Hodges v. Easton*, 106 U. S. 408, 1 Sup. Ct. 307, 27 L. Ed. 169. In *Ward v. Cochran*, cited above, there was a special verdict in an action of ejectment reversed and a new trial awarded, because there was no finding that the defendant's possession was adverse and exclusive, although there was a finding that the defendant and his grantors had entered into possession of the land in controversy under a claim of ownership, and that he remained in the open, continued, notorious, and adverse possession thereof for the period of 16 years. Without comment we adopted this course in *Anderson v. Messinger*, 146 Fed. 179, 77 C. C. A. 179, 7 L. R. A. (N. S.) 1094. In *Barber v. Coit*, 118 Fed. 272, 55 C. C. A. 145, we remanded an appeal for further evidence, upon our own motion, "because great injustice might be done if the case is to be decided upon the present record."

When the findings of fact do not support a judgment against the plaintiff, there can be no judgment for the defendant, upon a writ of error sued out by the plaintiff, where there is an issue made by the defendant, material in character, upon which there is no finding of fact. *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276, 293, 5 Sup. Ct. 141, 28 L. Ed. 722. When the trial court makes no finding upon

an issue made by the pleadings, because it was deemed unimportant, a court of review will remand for a finding upon the facts bearing upon that issue, if found to be material to a judgment, although all of the evidence relating to the question is in the record. In *City of Abilene v. Cornell University*, 118 Fed. 379, 382, 55 C. C. A. 205, the Circuit Court of Appeals for the Eighth Circuit said of such a situation:

"We might possibly look into the rejected record and depositions, and determine the issue arising on the plea, but, by so doing, we would be trying on appeal an issue that was not tried below."

Where an omission to make a specific finding of fact is due to the fact that the circuit court made a ruling upon a matter of law which rendered such a finding unimportant, it is the duty of the court that justice may be done, to reverse and remand, under section 701, Rev. St., for such further proceedings to be had in the inferior court as justice may require. *Little Miami Railroad Co. v. United States*, 108 U. S. 277, 280, 2 Sup. Ct. 627, 27 L. Ed. 724.

(157 Fed. 49.)

BOARD OF COM'RS OF CRAWFORD COUNTY, OHIO, v. STRAWN.

(Circuit Court of Appeals, Sixth Circuit. November 20, 1907.)

No. 1,675.

1. TRUSTS—UNLAWFUL DEPOSIT OF MONEY BY COUNTY OFFICER—TRACING OF FUND.

Under the statutes of Ohio a county treasurer has no authority to deposit taxes collected as a general deposit in a bank, and the bank can acquire no title to money so deposited as against the county, nor can an estoppel arise from any act of its officers which will prevent its recovery of such money from a receiver of the bank when it can be identified or traced into other property where it has been mixed with funds of the bank.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 526.]

2. SAME—MINGLING OF FUNDS BY TRUSTEE—PAYMENTS FROM COMMON FUND.

The rule that, where a bank has mingled trust money with its own funds, money paid out from such fund for its own purposes will be presumed to have been paid from its own money, and not from the trust fund, is qualified by the further rule that, if the mingled fund is reduced at any time below the amount of the trust fund, the latter must be regarded as dissipated, except as to such balance, and sums subsequently added from other sources cannot be treated as a part of the trust fund.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 520-525.]

3. SAME—RIGHT TO RECOVER TRUST FUND—NECESSITY OF TRACING.

The mere misapplication of a trust fund does not create a general lien on the tort-feasor's estate, but, to entitle the owner to recover such fund from a receiver of the trustee, it must be traced either in its original form or into specific property which passed to the receiver.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 553.]

4. SAME—SUIT AGAINST RECEIVER—UNLAWFUL DEPOSIT OF PUBLIC MONEY.

The cashier of a national bank in Ohio, at the time it went into the hands of a receiver in insolvency, was a deputy county treasurer, and had for some time previously been collecting taxes at the bank, which were deposited in the bank to the credit of the treasurer, and mingled with the bank's funds. Neither of such officers had any power under the law

to make such deposits nor to part with title to the money. Of the funds of the bank with which such taxes were mingled, a certain amount, less than the trust funds, remained on hand at all times, and there was a still larger amount in the fund when the receiver was appointed. *Held*, that the county was entitled to recover from the receiver, as a part of the trust fund, so much of the cash taken possession of by the receiver as equaled the lowest cash balance remaining in the bank at any time while the taxes were being collected, together with the collections subsequently made, but that it could not recover the proceeds of commercial paper acquired by the bank during such time and collected by the receiver, without establishing by proof that the tax money, or the fund in which it was mingled, in fact went into such paper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 553.]

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

For opinion below, see 149 Fed. 229.

C. H. Henkel and A. M. Snyder, for appellant.

W. J. Geer and W. M. Duncan, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. The object of this bill is to collect from the receiver of the Galion National Bank the sum of \$48,289.17; that sum being public taxes collected by the cashier of the bank while acting as a regularly appointed deputy of the county treasurer, and which sum stood as a general deposit to the credit of the county treasurer on the books of the bank when closed by the Comptroller and placed in the hands of a receiver. The funds of the bank are wholly insufficient to pay creditors in full, and the object of this bill is to have this claim declared a prior lien upon the assets in the receiver's hands, or, if not a lien and charge upon the entire assets, to follow the fund in so far as it can be traced. The ordinary relation of debtor and creditor did not exist between the bank and the county treasurer, because a county treasurer in Ohio is positively forbidden, except under circumstances which did not exist in this instance, to make a general deposit in any bank of taxes collected. Bates' Ann. St. Ohio, §§ 6,841 and 1,136 (1) to (9). But the authority of the county treasurer to appoint Blythe, the cashier of the bank, a deputy collector is not doubted. The statute law of Ohio, however, requires the county treasurer to keep his office in rooms provided at the county seat, and that all public money in his possession shall there be kept. It was, therefore, the plain duty of Blythe when he collected taxes to pay the same forthwith to his principal, and of the latter to keep the taxes so collected in his office. Blythe had, therefore, no authority to deposit the funds as a general deposit with the Galion Bank, and the latter was bound to know that it could not receive and mingle this fund with its general moneys. Merchants' Nat. Bank v. School District No. 8, 94 Fed. 705, 36 C. C. A. 432. Under the settled doctrine, the bank acquired no title to the public fund, and the public can recover the same, so far as it can be identified or traced into property which has come into the receiver's possession. That the county treasurer and the county commissioners had knowledge of this deposit, and that it was in pursuance of a course of business pursued for several years in succession without objection,

does not operate as an estoppel; for there being originally no authority to violate the positive provisions of the statute in either or all of these officials, no consent or acquiescence on their part will cure the title of the bank. The tax money, as it came into the bank's possession, was mingled with the bank's own funds and checks or other liabilities paid out of the general mass from day to day in the general course of business. The entire amount of the claim here asserted is for deposits made on account of taxes collected which fell due in 1903. The first item in the credit account is dated October 8, 1903, and the last February 2, 1904. When the bank closed on February 15, 1904, there was to the credit of the county treasurer \$48,289.17. But the money of the bank, which was turned over to the receiver, was only \$20,277.01. The mere fact that this tax fund, which, for short, we shall call the "trust fund" had been blended with the moneys of the bank does not fasten a lien upon the balance which the bank had on hand when its doors were closed. If trust moneys be wrongfully invested in bonds, or stocks or realty, or promissory notes or bills, and the particular property into which the trust fund has been changed can be ascertained, the owner may take the property and ratify the investment. Or, if the trust funds, along with the property of the trustee or bailee, be invested in an ascertained property, equity will follow the trust fund, not by taking the entire property, for that would be unjust, but by fastening a charge upon the property to the extent of the trust fund therein discovered. The blending of the trust money with the money of the trustee was suffered at one time to defeat the owner's title and compel him to stand as a mere unsecured creditor. This was upon the idea that money was not earmarked, and, therefore, could not be recovered in specie. But the later cases have met this difficulty in the case of blended moneys in a bank account, from which there have been drawings from time to time, by the fiction that the sums thus drawn out were from the moneys which the tort-feasor had a right to expend in his own business, and that the balance which remained included the trust fund which he had no right to use. It was upon this fiction that *Knochball v. Hallett*, 13 Ch. Div. 696, 726, et seq., was decided. That case was approved in *National Bank v. Insurance Company*, 104 U. S. 54, 26 L. Ed. 693, and has been followed in many subsequent cases when the trust fund has consisted of moneys on deposit. *Smith v. Mottley*, 150 Fed. 266.¹ But as this is a mere presumption it will not stand against evidence. It is, therefore, a part of the rule applicable to following misappropriated moneys into a bank account that, if at any time during currency of the mingled account the drawings out had left a balance less than the trust money, the trust money must be regarded as dissipated except as to this balance, the sums subsequently added to the account from other sources not being attributed to the trust fund. See the cases cited above and the following: *Beard v. Independent District*, 88 Fed. 375, 31 C. C. A. 562; *Boone County Bank v. Latimer* (C. C.) 67 Fed. 27; and *Spokane County v. Bank*, 68 Fed. 979, 16 C. C. A. 81. This side of the rule is peculiarly sound when it is sought to obtain an advantage in the distribution of the assets of an insolvent national bank. So long as the claim to advantage is bottomed upon the fact that the receiver has re-

¹ 80 C. C. A. 154.

ceived money or property into which the money of the claimant is shown to have gone the equity is a strong one, and, to the extent that the assets which have come into the hands of the receiver are shown to have been augmented by the receipt of the trust fund or its actual proceeds, other creditors should not complain if that is returned to which neither the bank nor its receiver had any just title.

The equitable principles applicable to the facts of this case must operate to deny any general charge upon either the money or other assets of the bank in possession of the receiver, and deny complainants relief in respect of the moneys in the vaults of the bank when it closed, except in so far as the county has shown, aided by the presumption as to the money used in drawings from the general fund with which the trust fund was blended, that its money has come into the possession of the receiver. Now, the books of the bank show that on February 1, 1904, the moneys in the vaults of the bank had been reduced to \$11,652.25. Between that date and February 15, 1904, there was deposited only \$45.36 on account of taxes collected. But the moneys deposited by other customers, over and above daily disbursements, increased the cash balance on hand to \$20,275.01—the amount on hand when the bank was closed February 15th. It is, therefore, demonstrated that every dollar of this trust fund had been actually paid out and dissipated by February 1st except this balance of \$11,652.25, plus \$45.26 of taxes deposited later. Only to the extent of this sum of \$11,697.61 has the complainant identified the money which came into the receiver's hands as part of the trust fund, and only to that extent was there an actual augmentation of the moneys which came to the possession of the receiver. The decree below limited the complainant to the recovery of this identified money so far as this part of the case goes, and to that much of the decree we agree.

But the complainant assigns as error that the court did not extend this rule to the balances to the credit of the Galion Bank in banks with which it kept a deposit account. The balances to the credit of the Galion Bank in these banks which have been received by the receiver aggregate something over \$6,000. The balances with these several banks was shifting from day to day during the currency of the tax deposit account. The credits given to the Galion Bank are shown to have sometimes come from collections, sometimes from proceeds of rediscounts, and sometimes from moneys sent from the vaults of the Galion Bank to these reserve or corresponding banks. On the other hand, the account was drawn against when exchange was sold and for other purposes. The trust fund is not traced into any of the rediscounts or collections, which in part made up the credits in these banks. That the moneys remitted were not out of the trust fund is to be presumed; for the presumption upon which equity acts in respect of the character of the funds drawn out of the mingled mass of money in the bank's vaults is that the bank drew out only its money, leaving in its vaults the money which it was obligated to retain and not use for any private purpose. The court below was right in holding that no part of the money deposited with the corresponding banks and which has come to the receiver's possession has been identified.

The third and last question arises upon an error assigned by the ap-

peal of the receiver. The facts necessary to be stated are these: Between the opening of this tax deposit account and the closing of the bank on February 15, 1904, the transactions of the bank aggregated about \$8,000,000. During that period, commercial paper aggregating about \$142,000 was acquired by the bank, which has come to the hands of the receiver. The amount collected by the receiver from this paper is \$11,588.71. This being the residue after deducting amounts paid to redeem part of this paper held as collateral by reserve banks. The court below held that this paper was acquired by the application of the general funds of the bank with which the tax fund had been blended, and that the county was entitled to a general lien upon the proceeds of this paper already collected, and to such additional sums as the receiver should later collect, until the entire tax money should have been repaid. Thus the court below declared a general lien upon all of the assets of the bank acquired between October 8th, and February 15th. This paper consists of, perhaps, 100 distinct bills and notes, and each seems to have been a separate transaction. The fund collected comes from the payment of a few of these bills and notes. Upon the great mass of this paper nothing has been collected, and little more is likely to be. The assumption that all of these bills and notes were bought and paid for by the actual application of the money in the vaults of the bank with which the trust fund money has been mingled, or for loans made out of that fund, is not borne out by the evidence. Some of the transactions did not involve the actual payment of any money out of the funds of the bank, inasmuch as the proceeds would be passed to the credit of the party procuring the discount. In some cases the credit thus obtained was possibly drawn upon afterwards. The bank officers were unable to point out a single piece of this commercial paper in the receiver's possession as having been acquired by the actual use of the blended money of the bank and the county. The most that can be made out of the facts in respect to the consideration for this mass of commercial paper is that some of it was doubtless so paid for, while other paper represents mere book credits and did not lessen the cash of the bank a dollar. Some of this paper, as shown by the date of its execution, was acquired after the cash in the bank had been reduced to its lowest point on February 1, 1904. Paper taken after that date was therefore acquired, if its acquisition involved the paying out of money, with the money of the general depositors with which the county fund had not been blended. The residue of the bank's funds on February 1, 1907, was \$11,652.25, and we here affirm the decree of the court below which returned that residue to the county, as its identified money. It would be a gross inconsistency to say that this residuum not only remained in the vaults of the bank and passed to the receiver's possession, but that it had been traced also into commercial paper thereafter acquired. Either no part of the money in the hands of the receiver is the money of the county, or no part of the county's money went into such paper after February 1st. Now, of this mass of \$142,008.20 worth of paper, which is shown to have been acquired during the currency of this tax deposit account, more than \$60,000 appears to have been acquired after February 1st, and more than one-half of the total collections made by the receiver come from

that paper. But if this logic is unsatisfactory, and we are to infer that the whole of this residuum of February 1, 1904, did go into this paper bought after that date, then, as that sum has been returned "as money," complainants will have reclaimed every dollar which, on this presumption, went into paper acquired after that date, and has no cause to complain. Without going more into detail, it is enough to say that the evidence does not satisfy us that all or any large part of this mass of paper was acquired by the use of the moneys of the bank with which this trust fund had been mingled, and certainly there is no evidence pointing to an investment of the mingled fund in any specific bill or note, so that we might determine the extent to which the assets which the receiver holds have been augmented by the receipt of any bill or note in part acquired by the trust fund. But aside from this view of the evidence, the claim to a general charge upon any and all property acquired by the bank, through the use of the general funds of the bank with which this trust fund had been blended, is not supported by the weight of authority, nor do the cases decided by this court go so far. That the misuse of this trust fund has gone to swell, in one form or another, the general assets of the bank is not enough to charge the whole with a lien, will not be seriously contested. The cases which deny such a contention are numerous. To impress a trust upon the property of a tort-feasor who has used the trust fund in his private affairs, it must be traced in its original shape or substituted form. *City Bank v. Blackmore*, 75 Fed. 771, 21 C. C. A. 514, *In re Taft*, 133 Fed. 511, 514, 66 C. C. A. 385, *Erie Ry. v. Dial*, 140 Fed. 689, 691, 72 C. C. A. 183, *Smith v. Mottley*, 150 Fed. 266, 80 C. C. A. 154, and *Smith v. Township of Au Gres*, 150 Fed. 257, 80 C. C. A. 145, are cases decided by this court, which recognize that the mere misapplication of a trust fund does not create a general lien upon the tort-feasor's estate. In other courts, the question has been presented more squarely for a decision, and supports the rule that an identification of the fund itself, or a tracing into some specific property, is essential to reach the property of a wrongdoer, either in the hands of an assignee, trustee, receiver, or under a lien fastened by a creditor. *Peters v. Bain*, 133 U. S. 670, 693, 10 Sup. Ct. 354, 33 L. Ed. 696; *Board of Fire & Water Commissioners v. Wilkinson*, 119 Mich. 655, 78 N. W. 893, 44 L. R. A. 493; *In re Mulligan* (D. C.) 116 Fed. 715; *Gianella v. Momsen*, 90 Wis. 476, 63 N. W. 1018; *Little v. Chadwick*, 151 Mass. 109, 110, 23 N. E. 1005, 7 L. R. A. 570. *Taylor v. Plumer*, 3 M. & S. 562, is a case which has been questioned only as to the difficulty there referred to *arguendo* of following money mingled with the agent's own money. *Carmany's Appeal*, 166 Pa. 622, 31 Atl. 334; *Cavin v. Gleason*, 105 N. Y. 257, 11 N. E. 504; *Arbuckle v. Kirkpatrick*, 98 Tenn. 221, 229, 39 S. W. 3, 36 L. R. A. 285, 60 Am. St. Rep. 854; *Spokane County v. Clark* (C. C.) 61 Fed. 538, affirmed by the Circuit Court of Appeals for the Ninth Circuit, 68 Fed. 979, 991, 992, 16 C. C. A. 81; *Beard v. Independent District*, 88 Fed. 375, 31 C. C. A. 562; *Richardson v. New Orleans Debenture Redemption Co.*, 102 Fed. 780, 42 C. C. A. 619, 52 L. R. A. 67; *Spokane County v. First Nat. Bank*, 68 Fed. 979, 982, 991, 992, 16 C. C. A. 81; *Multnomah County v. Oregon Nat. Bank* (C. C.) 61 Fed. 912; *Commercial Nat.*

Bank v. Armstrong (C. C.) 39 Fed. 684, 692; and Frelinghuysen v. Nugent (C. C.) 36 Fed. 229.

Peters v. Bain, 133 U. S. 671, 678, 693, 10 Sup. Ct. 354, 33 L. Ed. 696, is a very close authority upon the facts of this case. There the moneys of a national bank had been obtained and used in breach of trust by a firm of private bankers. Both failed; the firm after a general assignment. The receiver of the national bank sought to impress with a trust the entire property of the firm in the hands of its assignee. It was shown that the bank's money had been used exclusively in the purchase of certain property. It was sought, also, to impress a lien upon other property which had been "paid for by the firm out of the general mass of moneys in their possession, and which may or may not have been made up in part of what had been wrongfully taken from the bank." Waite, C. J., heard the case on circuit, and, as to this class of property, said:

"There the purchases were made with moneys that cannot be identified as belonging to the bank. The payments were all, so far as now appears, from the general fund then in the possession and under the control of the firm. Some of the money of the bank may have gone into this fund, but it was not distinguishable from the rest. The mixture of the money of the bank with the money of the firm did not make the bank the owner of the whole. All the bank could, in any event, claim would be the right to draw out of the general mass of money, so long as it remained money, an amount equal to that which had been wrongfully taken from its own possession and put there. Purchases made and paid for out of the general mass cannot be claimed by the bank, unless it is shown that its own moneys then in the fund were appropriated for that purpose. Nothing of the kind has been attempted here, and it has not even been shown that, when the property in this class was purchased, the firm had in its possession any of the moneys of the bank which could be reclaimed in specie. To give a cestui que trust the benefit of purchases by his trustees, it must be satisfactorily shown that they were actually made with the trust funds."

The opinion of the Supreme Court was by Fuller, Chief Justice, who affirmed the Circuit Court, and overruled the claim of a general charge, saying that "purchases made and paid for out of the general mass cannot be claimed by the bank, unless it is shown that its own moneys then in the fund were appropriated for that purpose." The contention that the cases of *Smith v. Mottley* and *Smith v. Au Gres*, decided by this court, sustain the decree below in giving a general lien upon all the bills and notes acquired by the bank during its custody of the tax deposit, is a misapprehension. *Smith v. Mottley* was this: Miss Smith owed a sum of money to Miss Wintersmith. When the note fell due she paid into Mottley's bank the amount of the note, the bank claiming authority to collect the same, and that it would obtain the note and deliver it to her. Within 10 days the bank failed. The money so paid into the bank was placed upon the books of the bank to the credit of the payee. When Miss Wintersmith learned of the transaction, she repudiated the authority of the bank to collect her debt from Miss Smith. The latter filed her petition in the bankrupt court, and asked that her claim against Mottley's bank be paid in preference. From the time the bank wrongfully received Miss Smith's money until the time its doors were closed its general cash balance was never below the amount of Miss Smith's claim, and a

sum of money in excess of her claim passed to the bankrupt's trustee. The court held that upon these facts the fund in the trustee's hands had been augmented to the full amount of this trust fund. Thus, neither the facts of the case nor the conclusion of the court justify the contention now made. The opinion cites and reaffirms earlier opinions by this court, including *City Bank v. Blackmore*, 75 Fed. 771, 773, 21 C. C. A. 514, and *In re Dial*, 140 Fed. 689, 691, 72 C. C. A. 183; in both of which cases we had to deal with the question of the extent of a reclamation when it was sought to follow the property of the owner into the hands of a receiver or bankrupt trustee. In the *Blackmore Case*, it was sought to fasten a general charge upon the assets in the hands of a national bank receiver, because there had been an unauthorized use of the claimant's property or funds by the bank. Touching the necessity of either identifying the owner's property in the hands of the receiver or showing that the assets which had come into his hands had been definitely augmented by property into which it had gone, this court, speaking by Judge Taft, said:

"It may not be necessary to show earmarks upon the proceeds of the thing parted with to justify such a remedy; but it must at least appear that the funds in the hands of the receiver were increased or benefited by the proceeds, and the recovery is limited to the extent of this increase or benefit. In every case relied upon by counsel for appellant, recovery, if decreed, was based on the fact that the property in the hands of the assignee or receiver of the person or bank against whom the claim of fraud, right to rescind, and priority of distribution was made, included in its mass either the very thing parted with or its proceeds. *Railroad Company v. Johnston*, 133 U. S. 573, 10 Sup. Ct. 390, 33 L. Ed. 683; *Armstrong v. Bank*, 148 U. S. 50, 13 Sup. Ct. 533, 37 L. Ed. 363; *Cragie v. Hadley*, 90 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9. The exact question is discussed with satisfactory fullness in *Bank v. Latimer*, (C. C.) 67 Fed. 27; and the necessity for the presence of the proceeds of the very thing obtained by fraud in the mass of assets to be distributed is clearly pointed out."

The opinion in *Re Dial* was announced by the same member of the court who wrote the opinion in *Smith v. Mottley*, as well as the opinion in the *Au Gres Case*, to which we shall refer later. That was a case where certain rubber, to which the bankrupt had no title, had been wrongfully used and made up into tires. Bankruptcy ensued. The owner of the rubber, by petition, asserted his right to the rubber and to follow it into the tires into which it had gone. It appeared that this rubber had been worked into tires, and that rubber of the bankrupt had been worked into other tires, and the tires made from both had been so intermingled that those made from the petitioner's rubber could not be distinguished from those made from the bankrupt's rubber. In this condition some of these tires came into the possession of the bankrupt's trustee. We held that, under such circumstances, the petitioner was entitled to enforce a charge against the tires which had passed to the trustee, to the extent that the assets had been augmented by the rubber of the petitioner, and ordered an account. Upon the necessity of tracing the trust fund into the trustee's possession, we said:

"We recognize that the rule only permits the following of the converted property into assets which can be traced as proceeds, and that the lien does not attach to assets in which neither the thing nor its value can be found."

In the *Au Gres Case* it was shown that a township treasurer had used the public funds in his hands in buying additional merchandise, and adding the same to his stock as a general merchant. He became bankrupt, and this stock of merchandise thus augmented went into the possession of the trustee. The particular items which had been paid for and added to the general stock were not ascertainable, but this court held that the misappropriated trust fund, having been traced into the general stock, constituted a prior lien and charge upon the stock as a unit. This case proceeds upon the theory that a stock of merchandise constitutes a subject which is capable of being sold or mortgaged as an entirety, and in the latter case the mortgage is not invalid if it provides for a continuance of the business, merchandise added from time to time to take the place of that sold passing under the mortgage. It is quite distinguishable from the case at bar, where it is sought to fasten a trust fund upon hundreds of distinct pieces of commercial paper made by many different persons and acquired at different times, because it is probable that some of such bills or notes were acquired with the general funds of the bank with which had been mingled some part of complainants' tax deposits. See text 6 Cyc. 1041, "Future Interests," and cases cited in notes following.

Complainants have not shown that any single piece of that mass of bills and notes was acquired with the blended moneys of the bank and of the tax fund, still less are they able to show that the assets in the receiver's hands have been actually augmented by a dollar collected from paper so paid for by the mingled fund.

The decree must be modified as to this, and affirmed as to all other matters. Costs of this court will be divided.



(157 Fed. 57.)

In re NEFF.

(Circuit Court of Appeals, Sixth Circuit. November 20, 1907.)

Nos. 1,671, 1,672, 1,673.

1. FRAUDS, STATUTE OF—CONTRACTS WITHIN STATUTE—ORAL ACCEPTANCE OF WRITTEN OFFER.

A promissory note by which the makers promised to pay a stated sum to the payee on a future date on surrender of certain shares of stock of a corporation, accepted by the payee, is a written contract to take and pay for such shares, and is not within the statute of frauds.

2. BANKRUPTCY—PROVABLE DEBTS—DEBTS OWING AT TIME OF BANKRUPTCY.

That a claim arises as a consequence of bankruptcy is sufficient to render it provable as a fixed liability absolutely owing at the date of the filing of the petition, within the meaning of Bankr. Act 1898, § 63a (1), c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447].

3. SAME—BANKRUPTCY AS ANTICIPATORY BREACH OF EXECUTORY CONTRACT.

Bankruptcy is such an anticipatory breach of a contract to take and pay for stock of a corporation at a stated price and time, which time was subsequent to the bankruptcy, that a claim for damages for the breach is a provable debt.

Appeal from the District Court of the United States for the Southern District of Ohio.

84 C.C.A.—36

The following is the opinion of the District Court by Thompson, District Judge:

These petitions present the same questions, and will be considered together.

The petitioners, as creditors, proved claims against the bankrupt, which were allowed but afterwards were expunged upon the ground that they were not provable. They were expunged upon the petitions of the trustee, which were submitted to the referee upon an agreed statement of facts which reads as follows:

"We agree that the makers of the promissory note or contract filed as the basis of this claim were promoters of the Avery Caldwell Co.—that in order to induce the claimant to purchase or subscribe for shares of stock in said company they agreed to execute and deliver to claimant the note or contract filed—that claimant paid the full sum of \$—— and received therefor the —— shares of stock filed with his claim and the said note or contract—that at and before the filing of the petition in bankruptcy the —— Co. was insolvent."

The following are copies of the promissory notes or contracts:

"\$2500.00

Bellaire, Ohio, April 14th, 1905.

"April 15th, 1908, after date, I, we or either of us promise to pay to the order of Allen Chaney Twenty-five Hundred Dollars at The Office of The Avery Caldwell Mnfg. Co. upon surrender of 2500 shares of Preferred Stock of The Avery Caldwell Mnfg. Co. Interest at 7 per cent. Value received.

"J. Brent Harding,

"Theodore Neff,

"Anson C. Lamb."

"\$2500.00

Bellaire, Ohio, Feb. 7, 1905.

"Two years after date I, we, or either of us promise to pay to the order of Miss Emily M. Nichols Twenty-five Hundred and no-100 Dollars at The Office of The Avery Caldwell Mnfg. Co., upon surrender of Certificate No. 38 for 2500 shares of Preferred Stock of said Company. Interest at 7 per cent per annum. Value received.

J. Brent Harding,

"Theodore Neff."

"\$1000

Bellaire, Ohio, January 20, 1905.

"Two years after date I, we, or either of us promise to pay to the order of J. D. Lyle One Thousand Dollars at The Dollar Savings Bank, Bellaire, upon surrender of 1000 shares of stock of The Federal Casket Co. Interest 7 per cent per annum.

J. Brent Harding,

"Theodore Neff,

"Chas. P. Lee,

"Anson C. Lamb."

"\$1500.00

Bellaire, Ohio, April 1, 1905.

"On demand April 1, 1907, after date we promise to pay to the order of James D. Lyle Fifteen Hundred Dollars at the office of The Avery Caldwell Mnfg. Co., Bellaire, Ohio, upon surrender of Certificate No. 61 for 1500 shares of The Preferred Stock of The Avery Caldwell Mnfg. Co. 7 per cent Dividend guaranteed from April 1, 1905, to 1907. Value received.

"J. Brent Harding,

"Theodore Neff."

Before the filing of the petition in bankruptcy herein, the two corporations failed and their stock became and is now utterly worthless. Neff was adjudged a bankrupt January 20, 1906, and the claimants proved their claims within 30 days thereafter. The question presented is, were these claims provable?

The agreed statement of facts is meager and leaves much to conjecture. The circumstances suggest different yet plausible views of the character of these transactions, but the best supported is that the stock was subscribed for upon the agreement of the promoters to redeem it. It may be that the promoters needed the use of the money, and that the names of the claimants

added to the list of stockholders, would aid their enterprise, and that in consideration therefor they agreed to redeem it. Those agreements were evidenced by writings, upon which these claims were founded, which fixed the times and places for the payment of the prices agreed upon and for the delivery or surrender of the stock. In substance, if not in form, these transactions may have been loans of money at 7 per cent., secured by collateral (the stock) which, upon payment of the loans, was to be surrendered or delivered up with the notes. If so, then these claims represent fixed liabilities, evidenced by instruments in writing, absolutely owing at the time of the filing of the petition in bankruptcy, although not then payable, and are provable claims against the estate of the bankrupt, under section 63a (1) of the Bankrupt Act of July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447].

If, however, these instruments be regarded as contracts to purchase the stock at the prices and times and upon the terms specified (and one or the other of these two views must prevail), the adjudication in bankruptcy disabled Neff from performing these contracts and was equivalent to an anticipatory breach thereof, and, coincident therewith, rights of action arose in favor of the claimants to enforce these contracts, and the claim became provable under section 63a (4) and the proof and filing thereof, accompanied by the stock and notes, was a sufficient delivery or surrender thereof in compliance with the requirement of the contracts. *Rochester v. Delatur*, 2 E. & B. 678; *Frost v. Knight*, 7 Exch. 111. *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; *In re Swift*, 7 Am. Bankr. Rep. 374, 112 Fed. 315, 50 C. C. A. 264; *In re Pettingill & Co.* (D. C.) 14 Am. Bankr. Rep. 728, 137 Fed. 143; *Watson v. Merrill*, 14 Am. Bankr. Rep. 454, 136 Fed. 359, 69 C. C. A. 185, 69 L. R. A. 719; *Dunbar v. Dunbar*, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084.

The contracts were in writing and signed by the parties to be charged, and were delivered to and accepted by the claimants, which was a sufficient compliance with the statute of frauds, and takes the case out of the operation thereof. *Thayer v. Luce*, 22 Ohio St. 62; *Himrod Furnace Co. v. Cleveland*. Id. 451; *Brown*, Stat. Frauds, § 345c.

The findings and orders of the referee will be reversed, and the claims allowed.

E. E. Clevenger and Cook Danford, for appellants.

A. H. Mitchell, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges

LURTON, Circuit judge. These three appeals have been heard together, as they involve the provability of a number of claims against the bankrupt of like character. In tenor and substance the contracts are alike. That presented by Emily M. Nichols is an example and is as follows:

“\$2,500.00

Bellaire, Ohio, Feb. 7, 1903.

“Two years after date, I, we, or either of us promise to pay to the order of Miss Emily M. Nichols twenty-five hundred and no 100 dollars at the office of the Avery-Caldwell Mfg. Co., upon surrender of certificate No. 38 for 2,500 shares of preferred stock of said company, value received interest 7 per cent per annum.

J. Brent Harding,

“Theodore Neff.”

Some of these contracts related to the stock of a manufacturing corporation, known as the Avery-Caldwell Company, and others to the stock of the Federal Casket Company. It was agreed, as a fact, that the contract set out and others of like character were made by the persons signing the same as promoters, and to induce sales of the stock of the corporations named, and that in consideration of this agreement the claimants became subscribers to the stock of said com-

panies, paying therefor the amount named in each contract, and received therefor the shares of stock mentioned. It was also agreed that both of these corporations were "insolvent" before the bankruptcy of said Neff, and that this stock was of no value. The stock certificates were filed as part of the proof in each case and tendered to the trustee. The contracts are plainly agreements to purchase the shares of stock named at the time and price stated. They rest upon a sufficient consideration, and are written agreements to take and pay for the shares named and signed by the parties to be charged and delivered to and accepted by the promisees. There is, therefore, nothing in the objection as to the contracts being invalid under the statute of frauds because not signed by claimants also. *Thayer v. Luce*, 22 Ohio St. 62; *Himrod Furnace Co. v. Cleveland*, 22 Ohio St. 451; *Lee v. Cherry*, 85 Tenn. 707, 4 S. W. 835, 4 Am. St. Rep. 800; *Brown's Statute of Frauds*, § 345c. The status of a claim must depend upon its provability at the time the bankrupt petition was filed. At that time it must come within the definition of section 63 of the bankrupt act; it cannot be benefited by its status at a later date. The defense is that these claims were not "fixed liabilities," "absolutely owing" at the time of the filing of the petition against the bankrupt. This is based upon the fact that the liability of the bankrupt is made dependent upon the surrender of the stock certificate at a date which had not then arrived, and that it was optional with the promisees to surrender or keep the stock until that time, and that the liability of the promisor was undetermined and contingent until such surrender at the time named.

That the promisor might refuse performance until the time named is true. But if, before the time of performance, one absolutely repudiate liability and disavow unequivocally any purpose to perform at any time, the other party may treat such repudiation, at his election, as a breach of the agreement and sue for his damages. This is the rule as settled in *Hochster v. De La Tour*, 2 El. & Bl. 678, and approved by the Supreme Court in *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, and by this court in *Foss Brewing Co. v. Bullock*, 16 U. S. App. 311, 59 Fed. 83, 8 C. C. A. 14, and *Edward Hines Lumber Co. v. Alley*, 43 U. S. App. 169, 73 Fed. 603, 19 C. C. A. 599; *McBath v. Jones Cotton Co.*, 149 Fed. 383, 79 C. C. A. 203; *Michigan Yacht Co. v. Busch*, 143 Fed. 939, 75 C. C. A. 109. So, if one of the parties absolutely disables himself from performing the contract by putting performance out of his power, the other party may treat that as a repudiation and bring his action to recover damages then or wait the time of performance at his election. This aspect of the question of an anticipatory breach is well put by Fuller, Chief Justice, in *Roehm v. Horst*, cited above, when he says:

"It is not disputed that if one party to a contract has destroyed the subject-matter, or disabled himself so as to make performance impossible, his conduct is equivalent to a breach of the contract, although the time of performance has not arrived; and also that if a contract provides for a series of acts, and actual default is made in the performance of one of them, ac-

companied by a refusal to perform the rest, the other party need not perform, but may treat the refusal as a breach of the entire contract, and recover accordingly."

In *Lovell v. St. Louis Life Ins. Co.*, 111 U. S. 264, 274, 4 Sup. Ct. 390, 395, 28 L. Ed. 423, the company had failed and transferred its business to another company. The court held that this authorized one insured to treat the contract as at an end and to sue to recover back premiums paid although the time of performance had not arrived. Mr. Justice Bradley, for the court, said:

"Our third conclusion is that, as the old company totally abandoned the performance of its contract with the complainant by transferring all its assets and obligations to the new company, and as the contract is executory in nature, the complainant had a right to consider it as terminated by the act of the company, and to demand what was justly due to him in that exigency. Of this we think there can be no doubt. Where one party to an executory contract prevents the performance of it, or puts it out of his own power to perform it, the other party may regard it as terminated and demand whatever damage he has sustained thereby. We had occasion to examine this subject in the recent case of *United States v. Behan*, 110 U. S. 339, 4 Sup. Ct. 81, 28 L. Ed. 168, to which we refer."

See, also, *Carr v. Hamilton*, 129 U. S. 669, 9 Sup. Ct. 295, 32 L. Ed. 669.

Bankruptcy is a complete disablement from performance and the equivalent of an out and out repudiation, subject only to the right of the trustee, at his election, to rehabilitate the contract by performance. In the case styled *In re Swift*, 112 Fed. 315, 50 C. C. A. 264, this consequence was considered by the Court of Appeals for the First Circuit in a very satisfactory opinion by Putnam, C. J. There the obligation of a broker to deliver certain shares of stock on demand was held to be breached by bankruptcy, and that no prior demand was essential, a right of action accruing simultaneously with the bankrupt petition, which was the act of disablement to which the adjudication related. In *re Pettingill Co. (D. C.)* 137 Fed. 143, 147, Judge Lowell, in a very able and discriminating opinion in which the authorities are considered in the light of the requirements for a provable debt under the present bankrupt law, reached the conclusion that:

"If the bankrupt, at the time of bankruptcy, by disabling himself from performing the contract in question, and by repudiating its obligation, could give the proving creditor the right to maintain at once a suit in which damages could be assessed at law or in equity, then the creditor can prove in bankruptcy on the ground that bankruptcy is the equivalent of disablement and repudiation. For the assessment of damages proceedings may be directed by the court under section 63b, Act July 1, 1898, c. 541 (30 Stat. 562, U. S. Comp. St. 1901, p. 3447)."

In that case it was held that a contract guaranteeing "the redemption" of corporate shares, three years after date of issue, was a provable claim, although the time for "redemption" had not arrived at date of bankruptcy.

It is sufficient that a claim becomes provable as a consequence of bankruptcy. The right to sue for and recover damages then accrues. As Judge Lowell puts it in *Re Pettingill Co.*, cited above:

"In admission to proof, however, the claim need not arise before bankruptcy, nor need the contract be broken theretofore. It is sufficient for proof if the breach of contract and bankruptcy are coincident."

The creditor by offering to file his claim manifests his election to treat the contract as broken. This the court held he might do. The decree in each case is affirmed.

(157 Fed. 62.)

CASCADEN v. DUNBAR et al.

DUNBAR et al. v. CASCADEN.

(Circuit Court of Appeals, Ninth Circuit. October 28, 1907.)

No. 1,312.

1. FRAUDS, STATUTE OF—CONTRACTS WITHIN STATUTE—EXECUTORY AGREEMENT FOR JOINT VENTURE.

A parol agreement by which one party agreed to locate and mark mining claims and prepare the notices of location which were to be recorded by and at the expense of the other parties, the first party to have a half interest in the claims, and the second parties the other half interest, was one for a joint venture, to which both parties were to contribute personal services and money for their joint and equal benefit, and is not within the statute of frauds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, § 138.]

2. TRUSTS—CONSTRUCTIVE TRUSTS—FRAUDULENT BREACH OF ORAL AGREEMENT FOR ACQUISITION OF MINING CLAIMS.

One of defendants, on behalf of himself and his codefendants, who were his partners in the freighting business in Alaska, entered into an agreement with plaintiff by which the latter was to locate mining claims in the name of some one of defendants, who were to record the locations and pay the cost of recording, plaintiff to have a half interest in such claims, and defendants together the other half interest. From that time forward defendants as partners engaged in dealing in and working mining claims. Plaintiff located certain claims, and delivered the location notices to defendants, who did not, however, record the same, but, after the time for recording them had expired, relocated the claims for their joint benefit. *Held*, under the evidence, that defendants became partners for mining purposes from the time of the agreement made with plaintiff, and were all bound by such agreement; that their action in failing to perfect plaintiff's locations, and in relocating the claims, was for the fraudulent purpose of cheating plaintiff of his half interest; and that in equity they held such interest as trustees, for his benefit.

Appeal from the District Court of the United States for the Third Division of the Territory of Alaska.

These are cross-appeals, the plaintiff below being the appellant and cross-appellee, and the defendants the appellees and cross-appellants. The suit was brought to charge the defendants Dunbar, Scott, and Bennett, as constructive trustees of the plaintiff's alleged interest in certain mining claims situated in the Fairbanks mining district of Alaska, and to compel the conveyance thereof to him; the substance of the complaint being that on or about November 30, 1902, the plaintiff, being about to start on a prospecting trip for himself, entered into an agreement with those defendants, alleged to have been copartners carrying on the business of packers and miners under the name, style, and firm of Charles Scott, John Bennett, and George F. Dunbar, by which the plaintiff was at his own expense to proceed to search for, pros-

pect, and stake certain placer mining claims, and that, in addition to the claims staked for himself, he was to stake for, and in the name of, the said named defendants, or either of them, certain placer mining claims, in consideration of which the said named defendants agreed that they would forthwith, after such staking, record the locations thereof, and fulfill the other requirements of the rules and regulations governing the location of placer mining claims on vacant public lands, and convey to the plaintiff a one-half interest therein; that in pursuance of the agreement, and in accordance with those provisions, the plaintiff did on or about December 2, 1902, stake for the defendants Dunbar, Scott, and Bennett the following placer mining claims: "(A) In the name of the defendant John Bennett, side claim No. 12A below discovery on Cleary creek on the right limit, and the first tier thereof, placer mining creek claim No. 3, from the mouth of Lulu creek, a tributary of Cleary creek, placer mining claim No. 5 above discovery on Solo creek, a tributary of Fish creek, and the fractional creek claim No. 2, above discovery on Burns creek; (B) in the name of the defendant Charles Scott, creek placer mining claim No. 8 above discovery on Solo creek; (C) in the name of the defendant George F. Dunbar, a fraction known and described as fractional creek placer mining claim between discovery creek placer mining claim between discovery and No. 1 above on Solo creek, about 1,100 feet in length,—all of which said claims and creeks are situated in the Fairbanks mining district of Alaska." And that thereupon the defendant Bennett did on the 20th day of December, 1902, convey to the plaintiff a one-half interest in the claims so staked in Bennett's name, but that thereafter, intending to cheat the plaintiff out of his interest in the claims so located by the plaintiff, he entered into a fraudulent scheme with the defendants Scott and Dunbar, by which the three would abstain from recording the notices of the location of the claims as required by statute, and, in pursuance of such fraudulent scheme, the said three named defendants did so abstain and "so endeavored to cause the said claims to lapse and revert, and become reopen for entry," by reason of their failure to record, and there and then, and after the time for recording had passed, and that said defendants deemed said claims reopen for location, the said defendants Scott, Bennett, and Dunbar, with the intent to cheat and defraud the plaintiff as aforesaid, re-entered them as follows: "(A) The defendant George F. Dunbar restaked, relocated, and recorded in his name, for the partnership, side claim No. 12A below discovery on Cleary creek, right limit, first tier, and also the other claims previously located by the plaintiff in the name of the defendant Bennett, and also creek claim No. 8 above discovery on Solo creek, located by the plaintiff in the name of the defendant Scott. (B) The defendant Bennett restaked, relocated, and recorded, in his name for the partnership, the fractional creek claim previously located by the plaintiff in the name of the defendant George F. Dunbar, being fractional creek claim, about 1,100 feet long, situated on Solo creek between discovery and No. 1 above. (C) The defendant Charles Scott located in his name, for the partnership, the claim formerly located by the plaintiff for the defendant Bennett, to wit, No. 5 above discovery on Solo creek." The complaint further alleged that on the 17th day of May, 1904, the defendants Dunbar, Scott, and Bennett attempted to convey to the defendants Manley and Rice a one-third interest in the claim No. 12A below discovery on Cleary creek, and that those defendants had at the time full knowledge of the plaintiff's rights in the premises; that the claim last mentioned is of a value in excess of \$200,000; that the defendants are in possession thereof, operating the same, and extracting gold therefrom, to the plaintiff's damage; that the plaintiff has performed all of the covenants and conditions on his part to be performed under the agreement alleged, and has requested the defendant to convey to him, by a good and sufficient deed, his one-half interest in the claims, and to let him in possession thereof, and to account to him and pay him his share of the proceeds thereof—all of which they refuse to do. The defendant Bennett filed a separate answer, in which he admitted making the deed to plaintiff of December 20, 1902, but denying all of the other allegations of the complaint. The other defendants filed a joint answer, in which they denied all of the allegations of the complaint, with the exception that they admitted their possession and operation of claim No. 12A below discovery on Cleary creek, and admitted that

that claim is worth \$50,000. Upon the issues thus raised the case was tried before the court, and resulted in a decree directing a conveyance, by the defendants to the plaintiff, of an undivided one-third interest in the relocated claims.

McGinn & Sullivan, J. C. Campbell, and W. H. Metson, for appellant and cross-appellee.

T. C. West, Fernand De Journal, Hugh O'Neill, and John R. Jones, for appellees and cross-appellants.

Before GILBERT and ROSS, Circuit Judges, and DE HAVEN, District Judge.

ROSS, Circuit Judge (after stating the facts as above). The court below found the making of the alleged contract by the plaintiff with Bennett; that it was oral; that at that time Bennett, Scott, and Dunbar were general partners and then engaged in freighting, and immediately thereafter "in locating, acquiring, and working placer mines" in the vicinity of Fairbanks. The evidence shows without conflict that in the early part of December, 1902, the plaintiff made the locations set out in the complaint for the defendants Bennett, Scott, and Dunbar, and prepared the notices of location thereof, and gave them to Bennett for recordation, and that Scott and Dunbar, as well as Bennett, had actual notice of the plaintiff's action in locating the claims; and the court below so expressly found. But the court also found that "neither Scott nor Dunbar made any agreement of any kind with the plaintiff Cascaden, nor gave him any power or authority to locate mines for them, and the evidence does not show that Bennett had any power, as partner or otherwise, to employ him for that purpose." Other findings of the court below are as follows:

"That on May 21, 1903, Dunbar relocated bench claim No. 12A below discovery on Cleary creek, on the right limit and first tier, in his own name; on May 24, 1903, he relocated No. 5 above on Solo creek in the name of Scott, No. 8 above on Solo in his own name, and the fraction between discovery and No. 1 above on Solo creek in the name of Bennett; in doing so he saw and used the stakes set by Cascaden in his prior locations, and had full notice and knowledge thereof.

"On July 1, 1903, Scott, Bennett, and Dunbar were general partners, and held and owned each and all of the claims so mentioned in paragraphs 5 and 9 herein, as equal partners, and that on that day Bennett was the owner as such partner, and in possession of an undivided one-third interest in and to those placer mining claims mentioned in paragraphs 5 and 9 in these findings, and in those certain placer mining claims described in his deed to Cascaden so made and delivered on December 20, 1902; that on July 1, 1903, Cascaden presented the deed so made and delivered to him by Bennett on December 20, 1902, to the said Bennett, and requested him to formally acknowledge the same, and the said Bennett did on said July 1, 1903, acknowledge the same to be his deed, before J. Tod Cowles, a notary public in and for Alaska, who thereupon wrote his certificate of acknowledgment thereon; and the said Bennett again delivered the same to Cascaden, who thereupon filed the same for record, and the said deed and certificate of its acknowledgment was on that day recorded in the office of the recorder in the Fairbanks precinct, Alaska.

"That on July 1, 1903, and for a long time prior thereto, the placer mining claims so described in Bennett's said deed to Cascaden had been duly located by the defendants Bennett, Scott, and Dunbar; a discovery of mineral had been made thereon; the boundaries had been so marked that they could be

readily traced; and notices of location therefor had been filed and recorded in the office of the recorder in the district where they were situated.

"That on the 17th day of May, 1904, the defendant Bennett, made, signed, and delivered a deed in writing, whereby he attempted to convey to the defendants Scott and Dunbar a full, undivided one-third of the title to the placer mining claims formerly by him sold and conveyed to plaintiff Cascaden, by his deed of December 20, 1902, and acknowledged and recorded July 1, 1903, and that said Scott and Dunbar took and accepted said deed with full notice and knowledge of the prior deed to Cascaden. That on the 17th day of May, 1904, and subsequent to Bennett's deed to them, Scott and Dunbar made, signed, and delivered the deed in writing, whereby they attempted to convey to defendants Manley and Rice a full, undivided one-third of the title to the placer mining claims, so formerly sold by Bennett to Cascaden, and that said Manley and Rice took and accepted said deed with full notice and knowledge of the prior deed from Bennett to Cascaden of December 20, 1902, and its acknowledgment and record on July 1st, 1903."

The decree of the court below evidently proceeded upon the theory that Bennett acquired an undivided one-third of the claims described in the decree, by virtue of Dunbar's location thereof in May, 1903, which undivided one-third passed by the deed of Bennett to the plaintiff, executed December 20, 1902, and acknowledged and redelivered July 1, 1903—the defendants Manley and Rice having notice of the plaintiff's rights in the premises.

A careful consideration of the evidence in the case satisfies us that the plaintiff should have been awarded the undivided one-half of the interest of the defendants in all of the claims so relocated, for we think the record shows the truth to be that the defendants Bennett, Scott, and Dunbar were mining partners from the time of the making of the original contract of November 30, 1902, and that Bennett entered into the contract on behalf of himself, Scott, and Dunbar, and that the three, for the purpose of cheating the plaintiff out of his interest in the claims, thereafter entered into a fraudulent scheme by which they would and did withhold from recordation the notices of the locations made and prepared by the plaintiff, and after the time specified by the act of Congress for the recording of such notices had expired, made the relocations of 1903. We think it plainly appears that all of this was done for the fraudulent purpose of cheating the plaintiff out of his one-half interest, and it is equally plain that equity will not permit such purpose to be accomplished. That such cases do not come within the statute of frauds is well settled. The agreement involved personal services and necessary expenses incurred in the locations by the plaintiff, and necessary expenditures by the defendants Bennett, Scott, and Dunbar in recording the notices of such locations at Circle City (200 miles distant, it appears), where was located the office of the recorder of the mining district in which are situate the claims in question, and such other expenditures as may have been required by the rules and regulations governing such locations in that district. It was a joint venture, to which both parties to the agreement stipulated to contribute services and money for their joint and equal benefit. See *Gore v. McBrayer*, 18 Cal. 582; *Sandfoss v. Jones*, 35 Cal. 487; *Moritz v. Lavelle*, 77 Cal. 11, 18 Pac. 803, 11 Am. St. Rep. 229; *Murley v. Ennis*, 2 Colo. 300; *Welland v. Huber*, 8 Nev. 203; *Hirbour v. Reeding*, 3 Mont. 13; *Raymond v.*

Johnson, 17 Wash. 232, 49 Pac. 492, 61 Am. St. Rep. 908; Berry v. Woodburn, 107 Cal. 511, 40 Pac. 802; Lindley on Mines, §§ 796, 797; Snyder on Mines, §§ 1592-1596.

The judgment is reversed, and the cause remanded to the court below, with directions to award the plaintiff an undivided one-half of the interest of the defendants in the claims relocated by the defendant Dunbar in May, 1903, and his appropriate interest in the proceeds thereof, if any.

(157 Fed. 66.)

CASEY v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1907.)

No. 1,352.

RAILROADS—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

A street car in Chicago was stopped at a railroad crossing, and the conductor went forward, as required by the rules, to give the signal to the motorman when the crossing was clear. There were six railroad tracks; the first being a side track on which some freight cars were standing near the crossing, and the second the outbound passenger track. There were two inbound trains approaching on the further tracks, so that the crossing could not then be made, and while waiting the conductor was struck and killed by the engine of an outbound passenger train on the second track. The tracks were eight feet apart, and, by standing next to the side track in a place of safety, he could have seen approaching trains on any of the other tracks; outbound trains being visible for 600 feet before reaching the crossing. He was familiar with the crossing, and knew that the outbound train was due, and usually waited for it to pass at that time each day. *Held*, that in unnecessarily going upon the track while waiting he was guilty of negligence which at least contributed to his death, and precluded a recovery therefor as matter of law, regardless of the question of the negligence of the railroad company.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1026.]
Grosscup, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

This writ of error is prosecuted from a judgment entered against the plaintiff in error, who was plaintiff in an action to recover damages for the death of his intestate, Thomas Considine, through alleged negligence on the part of the defendant in error, in the operation of its road and trains. Upon the trial, at the close of the plaintiff's testimony in chief, the court instructed the jury "to return a verdict of not guilty." The testimony is preserved, with due exception to the instruction, and the issue for review arises thereupon. No substantial conflict appears in the testimony, and the material facts are recited in the opinion.

William E. Griffen, for plaintiff in error.

Charles B. Keeler, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge. The question whether contributory negligence on the part of the deceased is conclusively established by the testimony is the only one for solution under this record. The fault charged against the defendant railroad company—in the speed of the train, its "Southwest Limited," which caused the death, and alleged

insufficient warnings of its approach—as the primary issue tendered by the declaration, was rightly treated in the proceedings before the trial court, as entitled to submission to the jury under the evidence, except for the assumed proof of such contributory negligence. Unless the testimony concurs in a state of facts from which palpable fault of the deceased is the only reasonable inference—overcoming the presumption justly raised by the law in favor of the exercise of thought and care for his own safety—that issue was equally within the province of the jury, and the direction of a verdict by the court was unauthorized.

The circumstances under which the fatal injury occurred are substantially these, as shown by the plaintiff's testimony: Thomas Considine, the deceased, was conductor on a street car, engaged continuously for several years upon the route in question, on Chicago avenue, and familiar with the conditions at the railroad crossing. The street car line extends east and west along Chicago avenue, which is crossed diagonally by the defendant's railroad, extending southeasterly and northwesterly, with six railroad tracks, about eight feet apart. Approaching from the east, these tracks were arranged as follows: (1) a side track; (2) an outbound passenger track; (3) an inbound passenger; (4) an inbound freight track; (5) an outbound freight; and (6) a switch track. In the northwesterly direction the right of way reached an elevation by gradual incline, but the inbound trains approaching therefrom were in plain view from the crossing for ample distance. Southeasterly from the crossing, distant about 600 feet, Central Park boulevard crosses the railroad tracks with an overhead viaduct, so that trains (outbound) from the city are not within view until about reaching the viaduct, but for the intervening distance to Chicago avenue crossing the view is clear, as the tracks are substantially straight. Gates were provided at the crossing (operated from a tower) and a flagman was usually stationed there. The street car, in charge of the deceased, arrived at the crossing from the east, on the usual time of its run, about 6:20 p. m., when, as the motorman testifies, they "met the Southwest Limited going out of the city on that track mostly every night." The gates were open, and no flagman was observed. In conformity with his constant practice and duty, the car was stopped east of the crossing, and Considine went forward to ascertain and signal when the way was clear. The testimony is undisputed that a slowly moving freight train, pulled by its engine with headlight burning, was incoming from the northwest, on the inbound freight track, within plain view of Considine, when he started from the car; that the headlight of an engine pulling a passenger train on the inbound passenger track, "coming in much faster than the freight train," was in his view before reaching the tracks; that he looked in that direction, after reaching the second or outbound passenger track (with nothing to obstruct the view), and as well southward, where the view was unobstructed up to the viaduct, over 600 feet away. While several freight cars were standing on the easterly side track, south of the crossing, obstructing the view southward from the car, the way was clear, according to all the testimony, from the view point of Considine. All the witnesses who testify up-

on the subject were upon the street car, and concur in the statement that Considine was moving slowly westward over the tracks when last observed by either of them; all mention the closing of the gates, after he had passed them, and before the outbound limited reached the crossing, but do not concur in their estimates of the time. Two mention his looking back towards the gates when they closed. While thus serving as lookout for the safety of his car and passengers in crossing, the outbound limited, running on its usual time and track, came upon Considine, and the engine struck him and inflicted the fatal injuries. No witness called at the trial appears to have seen him when struck; and there is no testimony as to his position or movement when the engine came upon him, nor when he first observed its coming. All concur, however, that he was either in this outbound track, or just beyond (west) of it when last observed. The flagman stationed at the crossing was the first to reach him after the injury, but he was not called by the plaintiff as a witness, nor were any of the trainmen called. So the case rests upon the conceded facts of his long familiarity with the conditions of the tracks and train movements at this hour—with special reference to the daily stop, on the trip in question, for the passage of the limited on the outbound track—his known conduct in going upon or beyond the outbound track, and his opportunities for observing the approach of the train on that track when at least 600 feet away. The conductor was there, not to make the crossing for himself, but to watch for a safe crossing for his car. The oncoming freight and passenger trains from the northward gave ample warning that no passage was open over the west tracks until both had cleared the crossing; and meantime he was not required to go beyond the (east) side track in performance of his duty as conductor. What his purpose was in venturing beyond cannot be known; and the testimony furnishes no reasonable explanation. Nor is it known, or fairly inferable from the facts, why he failed either to stand a safe distance from the track of the limited, then due, or look for it constantly while in the place of known danger. His sole immediate duty was that of care for his own safety. With the train running at 25 or 30 miles an hour (as variously estimated by the witnesses), and no physical disability on his part, ample time would appear for his escape from either position of danger mentioned in the testimony, after the engine passed the viaduct, were vigilant watch kept up; and his obligation to such exercise of care, under the circumstances, is not open to question. No escape appears from the conclusion that this obligation was violated in any aspect of the testimony; and thus the negligence of the deceased was a contributory cause of injury, to say the least.

In *Dunworth v. Grand Trunk Western Ry. Co.*, 127 Fed. 307, 309, 62 C. C. A. 225, 227, Judge Jenkins, speaking for the court in reference to like circumstances, pertinently remarks:

"Such conduct, can be characterized only as reckless. Without necessity, he deliberately placed himself in a situation of known danger. In the open space he would have been immune from danger, and with equal facilities for seeing in both directions. He had no right to stand upon the track. Taking the risk, the consequences should not be imposed upon another. *Railroad Company v. Houston*, 95 U. S. 697, 24 L. Ed. 542; *Schofield v. Railway Company*,

114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; Northern Pacific Railroad Company v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014."

The case at bar is unmistakably within the ruling in the above-mentioned case, with the proof of contributory negligence, or needless risk assumed, greatly strengthened by the conceded facts, (1) that the limited train was due immediately, on the track in question; and (2) that the deceased was long familiar with such expectation, and had usually stopped for the train at that time and place. The common-law rule of contributory negligence as a bar to recovery may be set aside by legislation, but not by judicial means. Courts are to administer justice between parties in conformity with established law, without departure for individual views of hardship, either in the rule or its application.

The judgment of the Circuit Court, accordingly, is affirmed.

GROSSCUP, Circuit Judge, dissents.

(157 Fed. 69.)

AMERICAN SMELTING & REFINING CO. v. McGEE.

(Circuit Court of Appeals, Eighth Circuit. November 8, 1907.)

No. 2,543.

1. MASTER AND SERVANT—NEGLIGENCE—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

The plaintiff, an experienced holtermaker's helper, was sent to punch some holes in a piece of galvanized iron with a power punch. The die, a piece of tempered steel 2½ inches in diameter with a suitable hole in it, lay in a depression in the block so that the punch struck the hole in it true when he went to do his work. This die had been fastened in its place by a set screw which extended through the side of the block and into the die, but this screw had been broken for more than a month, so that the die was loose and there was danger that the punch would raise it from its position and displace it so that the punch would strike the solid steel of the die and injure the operator. The break in the screw and the looseness of the die were not readily observable, and the plaintiff was not aware of them. After he had punched several holes in the iron, and as he was making another, something struck his eye and put it out. After the accident there was a piece broken off of the point of the punch, and a piece broken off of the side of the hole in the die. Small particles sometimes fly off from galvanized iron when holes are punched in it, but there was no evidence that any serious injury had been known to result from them. *Held*:

There was substantial evidence of causal negligence of the master. The evidence that the servant assumed the risk or that he was guilty of contributory negligence was not conclusive, and these questions were for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 958-961, 1005, 1068-1132.

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

2. SAME—ASSUMPTION OF RISK—DEFECT MUST BE READILY OBSERVABLE TO RAISE.

The request to charge that if the employé knew or had an opportunity to know of the defect and appreciate its risk he assumed it, or was guilty of contributory negligence, was properly refused because the defect was not readily observable. The true rule is that if the servant knew of the

defect, or if it was so plainly observable that he could have seen it by the exercise of ordinary prudence, and if he appreciated that it was dangerous, he assumed the risk of it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 584.]

3. SAME—CONTRIBUTORY NEGLIGENCE.

The servant's opportunity to know of the defect, which was not obvious or readily observable, was not conclusive evidence of his negligence.

The court rightly charged that it was the servant's duty to use that kind of care for his own safety that an ordinarily prudent man, under similar circumstances with the plaintiff's experience, would use, and that if he failed to exercise this care and that failure directly contributed to his injury, he could not recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 674, 708.]

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Utah.

W. J. Barrette (Henderson, Pierce & Critchlow, on the brief), for plaintiff in error.

Thomas Marioneaux (O. W. Powers, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. As the plaintiff below was using a power punch of his employer to punch some holes in a piece of galvanized iron, something struck one of his eyes and put it out. He sued his employer, the American Smelting & Refining Company, the defendant below, for negligence, in that, among other things, it failed to provide the machine with threads in the chuck head that would hold the punch point tightly in place, and in that it failed to furnish a set screw which would hold the die securely in place so that in the operation of the machine the punch would surely strike the hole in the die true. The defendant denied that it was negligent, and averred that the plaintiff knew and assumed the risk of operating the machine. There was a verdict and judgment for the plaintiff.

The specifications of error are that the court refused to instruct the jury to return a verdict for the defendant, that it refused to instruct them that it was the plaintiff's duty to observe whether the machine was in a reasonably fair condition for use, and, if it was not, he either assumed the risk of his use of it or was negligent in using it, and in that it refused to instruct them that if the plaintiff, knowing or having the opportunity of knowing the condition of the machine, was of the opinion that it was safe, and used it, he could not recover. There was substantial evidence of these facts: The plaintiff was an experienced boilermaker's helper, and he was directed by his superior to punch out a hole in a piece of galvanized iron. The method to be pursued was to punch out some small holes around the inner circumference of a circle marked on the iron. There were two power punches, the smaller of which was used when the larger was in operation. The plaintiff was

competent to operate the machine and to do the work thus assigned him. The larger punch was in use, and he proceeded to the smaller one and punched several holes when, as he was punching another, something hit his eye and destroyed it. No foreign substance was found in the socket of the eye. The die of the machine was about $2\frac{1}{2}$ inches in diameter. It rested in a depression provided for it in a block, and had a hole in it with which the punch engaged when in operation. The punch and the die were tempered steel, and a collision between the punch and the solid portion of the die was dangerous to the operator. A set screw had been provided which passed through the side of the block and into the die, and which, when in proper condition, held the die rigidly in place in the block. When this set screw was broken or failed to engage both block and die, the latter would sometimes be drawn up out of its place, and there was danger that it would become displaced in that way so that the punch would not strike the hole in the die true, but would collide with the side of it. This set screw had been broken for a month or two, and it did not engage the die or hold it in place. Its condition was not obvious or readily observable. Immediately after the accident it was discovered that a small piece had been broken off of the end of the punch and out of the side of the hole in the die. When the plaintiff went to the machine to punch out the iron, the punch struck the hole in the die true, and he did not change or adjust any part of it. Particles sometimes fly off of galvanized iron while holes are being punched in it, strike operators and draw the blood, but no witness testified that he ever knew of a serious injury from that source. If one hole is punched out of galvanized iron and an attempt is made to punch another by the side of it, so that one side of the punch strikes the iron and the other falls into the hole in the die without obstruction, the metal sheet will force the punch to one side and cause it to collide with the steel of the die; but an experienced operator would not proceed in that way, and there was no evidence that the plaintiff did. There was evidence of other facts, but none that modifies the logical and legal effect of the facts which have been recited.

It was the duty of the employer to exercise ordinary care to furnish reasonably safe machinery, and to use ordinary care to maintain it in a reasonably safe condition of repair, and its failure to do so was negligence which, if causal, was actionable. The broken set screw, the absence of any effective means to hold the die securely in place for more than a month before the accident, the danger therefrom, the broken point of the punch and side of the hole after the accident, and the other facts to which reference has been made, constituted substantial evidence that the defendant was negligent in the inspection and repair of the machine, and that this negligence caused the injury. The evidence that it might have been caused by flying particles from the galvanized iron or by punching out the side of a hole so that one side of the punch met with no resistance was much less persuasive and insufficient to bring the case within the rule that when an injury may have been the effect of one of two or more causes the jury may not speculate on the cause. The natural and rational inference from the evidence was that

the injury was caused by the broken set screw and by the negligence of the defendant in failing to inspect and renew it. The risk of the loose die was not one of the ordinary risks of the employment. The plaintiff testified that he did not know that the set screw was broken or that the die was loose, and there was no evidence to the contrary. Its condition was not readily observable. It was inserted in the side of the block, and the break in it and its incapability of holding the die tightly in place were not obvious. The evidence, therefore, did not conclusively show that the plaintiff knew, or that a person of ordinary prudence by the exercise of reasonable diligence and care in his situation would have known, that the screw was broken or the die loose, and it was not the duty of the court to instruct the jury that he assumed the risk of this defect, or that he was guilty of contributory negligence in his use of the machine. The court rightly refused to instruct the jury to return a verdict for the defendant.

The refusal by the court of the two other requests to charge the jury present a single question. In each request counsel asked the court to charge the jury that the plaintiff could not recover if the plaintiff knew or had the opportunity of knowing or of observing the defective condition of the die. The requested instruction is sound and right in cases in which the defect is obvious or readily observable. In such cases a servant cannot fail to see a defect which is plainly observable, or to observe that which is obvious, and then recover because he failed, and if he knows or has the opportunity to know it and appreciates the risk from it he cannot recover. But this rule is inapplicable to this case because the defect was not readily observable. The punch struck the die true. The die was in its place. It appeared to be secure. The break of the set screw and the consequent looseness of the die which made it dangerous were not apparent. They could have been discovered by the plaintiff only by searching out the screw in the side of the block and trying it. The duty to make this search was not cast upon the plaintiff. The charge of the court upon this subject was: "If the plaintiff knew of the particular defect in this punch, if you find it actually caused the injury, and appreciated that it was dangerous, or if you believe it was so plainly observable that he could have observed it by the use of ordinary prudence, then he assumed that risk and he cannot complain that he was injured by it. Besides that, * * * the plaintiff was required to use just that kind of care for his own safety that an ordinarily prudent man, under similar circumstances, with the plaintiff's experience would use. * * * If he failed to use that kind of care and the injury would have been averted by the use of it, he was guilty of contributory negligence, and he cannot recover." The charge was right, and the court properly refused to give the instructions requested because they were not applicable to the facts of this case.

There was no error in the trial, and the judgment is affirmed. *Texas & Pacific Ry. v. Archibald*, 170 U. S. 665, 673, 18 Sup. Ct. 777, 780, 42 L. Ed. 1188.

(157 Fed. 73.)

CITIZENS' SAVINGS & TRUST CO. v. BELLEVILLE & S. I. R. CO.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1907.)

No. 1,358.

1. EQUITY—RIGHT TO RELIEF—LACHES.

A delay of more than 10 years in bringing suit, and beyond the time limited by statute for bringing an action at law, constitutes such laches, *prima facie*, as will bar relief in equity, unless the delay was excusable under the facts alleged.

2. SAME.

Defendant railroad company issued stock to a county, receiving in payment bonds of the county which it sold but which were afterward adjudged void. The stock was also afterward canceled at suit of a stockholder. Subsequently complainant, which was a holder of certain of the bonds, brought suit against defendant, and obtained a decree adjudging that defendant held the stock issued on account of complainant's bonds in trust for its benefit, and it was then issued to complainant. Prior to such suit, and pending the suit for cancellation of the county's stock, defendant declared and paid a dividend on its other stock, but purposely omitted such stock upon which it denied any liability. In the suit of complainant to compel the issuance to it of stock, it made no claim for such dividend, but more than 10 years after the same had been declared made demand therefor and brought a second suit in equity for its recovery. *Held*, that *prima facie* such suit was barred by laches, and that the delay was not excused by general averments in the bill of want of knowledge of the dividend of due diligence and concealment by defendant, without the allegation of any facts to support such general averments.

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

This appeal is from a decree which dismisses for want of equity a bill filed by Citizens' Savings & Trust Company, as complainant, against the appellee railroad company, upon demurrer to the bill. The suit is for recovery of alleged dividends declared by the appellee upon its stock, whereof 400 shares were held by it in trust for and equitably the property of the appellant, as adjudicated in a prior suit between the parties. The facts averred in the bill in reference to the stock transactions are substantially the same which are stated, in connection with the opinion of this court, in the above-mentioned prior litigation, reported as *Citizens' Savings & Loan Ass'n et al. v. Belleville & S. I. R. Co.*, 117 Fed. 109, 54 C. C. A. 495. In reference to the dividends claimed, the averments are in substance: That "on or before the ——— day of ———, 1896," 4,170 shares of common stock had been issued by the appellee, inclusive of the above-mentioned 400 shares transferred to the appellant under the prior decree, and "on said ——— day of ———, 1896," a dividend was declared by the directors of 19 per cent. upon the common stock, and actually paid upon 3,170 shares; that the dividend was not paid upon the appellant's 400 shares, and payment thereof was demanded and refused on July 28, 1905; that the trust in favor of the appellant existed during the years 1896 and 1897, but it was not notified of such declaration of dividend; that the appellee (railroad company) "concealed the same"; and that your orator exercised reasonable diligence, but did not learn of same "until the ——— day of July, 1905."

This bill was filed March 14, 1906. Nine several grounds for demurrer are stated, namely: (1) The remedy, if any exists under the allegations, is complete at law, and jurisdiction in equity does not appear; (2) the dividend, as alleged, was payable before complainant became a stockholder; (3) Perry county is a necessary party, and (4) was the stockholder entitled to the dividend sued for, if any one was entitled thereto; (5) the alleged cause of action did not accrue within five years, and is barred by limitation, and (6) did not

accrue within 10 years limited by statute; (7) laches appears in delay of suit with no facts stated to excuse the delay; (8) the prior decree averred in the bill is *res judicata*; and (9) full performance thereof appears on the part of defendant.

J. M. Blayney, for appellant.

Blewitt Lee, for appellee.

Before BAKER and SEAMAN, Circuit Judges, and SANBORN, District Judge.

SEAMAN, Circuit Judge (after stating the facts as above). The Citizens' Savings & Trust Company, appellant, filed the bill in question to recover dividends upon 400 shares of stock in the appellee railroad company; ownership of such stock having been awarded the appellant, under its former corporate name, in a prior decree between the parties, under mandate from this court. *Citizens' Savings & Loan Ass'n v. Belleville & S. I. R. Co.*, 117 Fed. 109, 54 C. C. A. 495. The decision referred to settled the relation of each to the shares of stock through the original void transactions of Perry county in subscription therefor and issue of bonds in payment, sale of the bonds to the appellant, and use of the proceeds by the appellee for its exclusive benefit; that upon return of the stock by the county to the appellee for cancellation, under an adjudication of invalidity, the purchasers of the bonds became entitled to the benefit thereof; and that the appellant, under its purchase, was entitled to have 400 shares of stock issued accordingly. No rights there involved are reviewable under the present bill, and the question is whether recovery of the alleged dividends upon this stock is authorized in equity, under the facts now averred, in the light of that adjudication. The several grounds of demurrer do not require examination in detail, if the bill is without equity under either of the objections.

For the relief sought, it is averred that the appellee declared a dividend of 19 per cent. upon its common stock on the "—— day of ———, 1896," when 4,170 shares had been issued, of which the "shares now held and owned" by the appellant "are a part," and made payments on 3,170 shares only, thus leaving unpaid the dividends on the shares issued to Perry county (which included the stock in question), canceled on October 25, 1897, under the decree of invalidity above mentioned. It is further averred that the trust declared in favor of the appellant in the prior decree "was in existence during the years 1896 and 1897"; that the appellant was not notified that such dividend was declared, and the appellee "concealed the same"; that the appellant "exercised reasonable diligence, but did not learn of the same until the —— day of July, 1905"; and that payment was demanded and refused July 28, 1905. This bill was filed March 14, 1906, and the question arises at the threshold whether the suit in equity, if otherwise entertainable, is not barred by the long delay thus disclosed, notwithstanding these vague averments by way of excuse. The objections, both of statutory limitation and laches, are expressly raised by the demurrer, and unless the delay is excusable under the facts alleged, a fundamental requirement of equity for the exercise of its jurisdiction is wanting, and the decree dismissing the bill may well

rest on laches thus appearing (*Hardt v. Heidweyer*, 152 U. S. 547, 558, 14 Sup. Ct. 671, 38 L. Ed. 548, and authorities reviewed), without pursuing the further inquiry discussed in the arguments, whether the nature of the alleged liability would authorize enforcement in equity.

The maxim of equity jurisprudence, that "equity aids the vigilant, not those who slumber on their rights," must be observed throughout the administration of its remedies (1 Pomeroy's Eq. Jur. [2d Ed.] § 418); and it is indisputable—apart from the allegations of trust, to be considered later—that the conceded facts of the time which has run upon the demand in suit impute *prima facie* laches on the part of the appellant. Without other averments of fact to clear the demand from that imputation, within recognized principles of equity it is plain that no relief can be granted under the bill. *Hardt v. Heidweyer*, *supra*.

The events and dates which show the delay may be summarized: In 1870 the bonds were issued by Perry county in exchange for the appellee's stock, and the appellant purchased 40 of these bonds in 1871; interest was paid by the county upon the bonds until 1887, when further payments were refused; and in 1890 the appellant sued the county thereupon, but failed of recovery through adjudication that the bonds were void. *Citizens' Sav. & Loan Ass'n v. Perry County*, 156 U. S. 692, 15 Sup. Ct. 547, 39 L. Ed. 585. Subsequently (*Stebbins v. Perry Co.*, 167 Ill. 567, 47 N. E. 1048) other parties brought suit against the county for cancellation of the stock received in exchange, and obtained a decree, upon which the shares were canceled October 25, 1897, and returned to the appellee. On April 15, 1898, this appellant, under its former name, brought suit against the appellee to obtain certificates to be issued in its favor for 400 shares of the canceled stock, resulting in a decree accordingly, May 16, 1903, which was subsequently performed by the appellee. The dividends for which recovery is sought, if in any sense applicable to the void issue to the county, were declared long prior to the last-mentioned proceedings on behalf of the appellant claiming an equity in that issue of stock. The bill states this date indefinitely as the "—— day of ——, 1896," although it was conceded upon the argument that the actual date appears of record in books and reports of the railroad company as September 29, 1895. Demand of payment was made by the appellant, as averred, on July 28, 1905, and this suit was not commenced until March 14, 1906. The bill is silent upon any reference in the prior litigation to the benefit of any dividends which may have been earned or declared upon the stock there claimed; and if omitted from that controversy, no explanation appears, unless the above-mentioned general averments that the appellant was not informed of the declaration of a dividend until 1905 are sufficient to that end.

Thus the time which elapsed between the declaration of the dividend and the filing of this bill exceeds 10 years, either under the conceded fact of the actual date of dividend, or under the rule applicable to the indefinite time mentioned in the bill which would require such interpretation. Treated as a cause of action which accrued in favor of the appellant when the dividend was declared, suit for recovery was barred by the statute of limitations in Illinois, whether the obligation is one arising upon implied contract, or in writing under the res-

olution of the directors, as variously designated in the authorities cited, respectively, in the briefs. The provisions referred to are sections 15, 16, c. 83, Hurd's Rev. St. 1905 (2 Starr & C. Ann. Ill. St. 1896, [2d Ed.] pp. 2625, 2631), with the limitations of five years (section 15) "on unwritten contracts, express or implied," and ten years (section 16) "on bonds, promissory notes, * * * written contracts, or other evidence of indebtedness in writing." Assuming that demand and refusal of payment were needful to authorize a suit for the dividend, either at law or in equity, the demand must be made within a reasonable time to save from this bar (*Baker v. Brown*, 18 Ill. 91, 93, and authorities cited), and unless so made "the claim is considered stale, and no relief will be granted in a court of equity." *Codman v. Rogers*, 10 Pick. (Mass.) 112, 120; 1 Wood on Limitations (2d Ed.) § 118. These provisions are not controlling, however, upon the question of laches in equity, although the periods of statutory limitation are frequently adopted therein, by way of analogy, as tests of prima facie staleness of the demand.

The rule of negligence above referred to, which forbids aid to stale demands where the claimant "slept on his rights, and shows no excuse for his laches in asserting them," is independent of the statute of limitations, and the tests of laches conform to the principles of equity, not to the rigid rules of the common law which govern the question of limitation. So the mere lapse of time, however important in the consideration, may not amount to laches in the view of equity when other circumstances are shown which exclude the imputation of negligence and laches. The solution in each case rests upon its circumstances, and laches may appear and bar relief, although the delay is less than the period limited by statute. *Speidel v. Henrici*, 120 U. S. 377, 387, 7 Sup. Ct. 610, 30 L. Ed. 718; *Alsop v. Riker*, 155 U. S. 448, 460, 15 Sup. Ct. 162, 39 L. Ed. 218; *Patterson v. Hewitt*, 195 U. S. 309, 319, 25 Sup. Ct. 35, 49 L. Ed. 214.

In so far, therefore, as these statutory periods may serve as criterions of staleness in equity—apart from their force as statutory bars, either in law or equity—it is not essential to determine which period applies to a right of action for dividends in the common-law sense, as the alleged cause of action either accrued more than 10 years before the filing of the bill, or it was then within the power of the appellant to demand and enforce its assumed equities. Nor is it needful to decide the questions discussed in the briefs whether the statute of limitations operates as an independent bar under the averments of trusteeship in respect of stock and dividends. The consideration of laches involves all of these elements, and if facts appear which excuse the delay and free the claimant from fault or neglect therein, with the equities in his favor, he is not chargeable with laches through the lapse of time alone. On the other hand, if such long delay is not thus cleared, within the recognized principles of equity, from the prima facie want of diligence, laches is manifest, and the way of equity is not open for relief, without reference to the force of any statute of limitations.

When the alleged dividend of 1896 (1895) was declared "upon the common stock of the defendant"—with neither express recognition of

the 1,000 shares issued to Perry county as a valid issue or obligation, nor intention to include it therein, averred in the bill—the invalidity of the bonds issued by Perry county in exchange for the stock had been adjudicated and all parties so understood their status. The proceedings to have the stock canceled had long been pending, with cancellation then decreed in the circuit court, and the attitude of the appellee in denial of obligation upon such stock was manifest and unmistakable, not only through such proceeding on behalf of a stockholder, but in the alleged exclusion of such stock from dividend payments. Moreover, this stock was canceled October 25, 1897, under final decision and mandate of the state Supreme Court. The equities subsequently set up and established in favor of the appellant in 400 shares of such stock were manifestly ignored by the appellee at this stage, and left no room for the appellant to rest on the assumption that such equities would be recognized by the appellee, in payment of dividends or otherwise, without suit. Understanding on the part of the appellant to that effect clearly appears in the suit referred to, which was promptly instituted, April 15, 1898, to enforce its alleged equities, and was contested vigorously. Denial of equity in any dividends earned or declared upon the stock was equally manifest in this attitude of the appellee, and the only excuses offered in the present bill for the failure to prosecute a claim for dividends, either in that suit or separately, are the general averments before mentioned: (1) Of want of notice of such dividends; (2) that the appellee “concealed the same”; (3) that the appellant “exercised reasonable diligence, but did not learn of the same” until July, 1905.

The rule is elementary in equity pleading that material facts must be distinctly stated in the bill, not mere deductions of the pleader as to their effect, and without such groundwork of fact these general averments are insufficient. As pointed out and exemplified in the well-considered case of *Hardt v. Heidweyer*, *supra*, such averments of ignorance, concealment, and diligence, with no facts stated to test their truth and worth, do not aid the bill, and furnish no escape from the imputed laches arising from the delay. Presumptively, aside from admissions of fact at the bar, the dividend was declared by resolution entered of record, and likewise reported to the Railroad & Warehouse Commission of the state, in due course, as an item within the direction of section 6 of the legislative enactment in force after July 1, 1871, preserved in chapter 114 (section 172) Hurd's Rev. St. 1905 (3 Starr & C. Ann. Ill. St. 1896, p. 3304). In any view, however, no fact is stated which tends to show either suppression, withholding information, reasonable cause for ignorance, or diligence in inquiry or claim. With the fact of dividend declaration thus open to discovery on examination, if not either notorious or inferable under the circumstances, the neglect to make claim for them is without equitable excuse. If the appellant was entitled to an interest in such dividends, through its equities in the stock, it was equally a present right of action, which should have been brought into the suit then commenced; and in no event postponed, in demand and suit, as disclosed in the present bill. If the right arose, as averred, through a trust relation in respect of the stock, the trust was the same which was there disputed and liti-

gated—it rested solely upon the then existing fact, not upon the eventual adjudication—and postponement of the one claim for judicial determination of the other was neither needful nor equitable under the circumstances.

In reference to the general rule that limitations do not run upon claims arising through relations of trust, upon which the appellant relies, the plain disavowal of any such trust by the appellee, as before mentioned—in its insistence upon adverse right to the stock when demanded, if not before—raised the well-recognized exception to such rule, if otherwise applicable to the trust in question, so that reasonable promptness, both in demand and suit, became imperative for equitable relief, and the inaction and delay thereafter “opened the door to the defense of laches.” *Speidel v. Henrici*, 120 U. S. 377, 386, 7 Sup. Ct. 610, 30 L. Ed. 718, and authorities reviewed; *Patterson v. Hewitt*, 195 U. S. 309, 321, 25 Sup. Ct. 35, 49 L. Ed. 214.

We are of opinion that the averments of the bill disclose gross laches on the part of the appellant, and that no error appears in the dismissal for want of equity. The decree, accordingly, is affirmed.

(157 Fed. 78.)

In re LETSON.

(Circuit Court of Appeals, Eighth Circuit. October 19, 1907.)

No. 72.

1. BANKRUPTCY—HOMESTEAD—PURCHASE WITH NONEXEMPT FUNDS.

In the absence of a local rule to the contrary, the mere use by an insolvent of nonexempt funds or assets in acquiring a homestead does not make it subject to the claims of his creditors in bankruptcy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 668–670.]

2. SAME—ADJUDICATION—MATTERS CONCLUDED.

An adjudication of bankruptcy on a petition charging different acts of bankruptcy, and which does not show upon which one it proceeded, does not render either charge *res judicata* in the further proceedings.

3. SAME—REVIEW—PETITION TO REVISE.

The decision of a district court reversing that of a referee finding that a bankrupt was guilty of fraud in a transaction does not necessarily involve a question of law so as to be reviewable on a petition to revise, where, so far as shown by the record, there may have been a conflict of testimony as to the facts.

[Ed. Note.—Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

4. SAME—RIGHTS OF TRUSTEE.

There exists no special trust relation between a bankrupt, and his creditors during the four months preceding the bankruptcy which entitles his trustee to avoid his transactions during that time on grounds other than those specified in the bankruptcy act.

5. SAME—EXEMPTIONS—ESTOPPEL TO APPEAL.

The fact that a bankrupt accepted the benefit of an order of a referee, allowing him certain personal property exemptions, does not preclude him from appealing from a part of the same order relating to his homestead exemption.

On Petition for Review.

Charles West (Winfield Scott, on the brief), for petitioner.

James K. Beauchamp and R. L. Denton, for respondent.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. This is a controversy between the bankrupt and the trustee over a tract of land in Garfield county, Okl., claimed by the former as a homestead. The referee found that the bankrupt purchased the land while insolvent and within the four months preceding the commencement of the bankruptcy proceedings, and that in doing so he used for part of the purchase price nonexempt property, with intent to cheat and defraud his creditors. The referee ordered that the land be set aside as a homestead, but subject to a charge in favor of the trustee for the amount and value of the diversion from nonexempt assets. Upon certification the District Court held the land to be a homestead free from the charge, and the trustee thereupon presented to this court a petition to revise in matter of law.

In the absence of a local rule to the contrary, and there is none in Oklahoma, the mere use by an insolvent of nonexempt funds or assets in acquiring a homestead does not make it subject to the claims of creditors. Assuming the rule to be otherwise when there is an intent to cheat and defraud creditors, it should be said that the existence of such intent was disputed in the case before us. The referee found it existed; the District Court, upon the same evidence, found it did not exist, for such is the effect of its general finding in favor of the bankrupt. Upon a petition to revise, questions of law can be considered, but not disputed questions of fact, and the inquiry here is, was there error of law in the proceedings below? As to this the trustee says:

1. That a fraudulent diversion of nonexempt assets in acquiring the homestead was charged by the creditors in the original petition as an act of bankruptcy, and the adjudication which followed rendered that fact *res adjudicata*, and, therefore, as matter of law, not to be further denied. *Ayres v. Cone*, 138 Fed. 778, 71 C. C. A. 144. But there were five other distinct acts of bankruptcy charged in the creditors' petition, and the record does not show upon which the adjudication proceeded; therefore the matter is at large. *Russell v. Place*, 94 U. S. 606, 24 L. Ed. 214; *Ætna Life Ins. Co. v. Board of Com'rs*, 117 Fed. 82, 54 C. C. A. 468. The adjudication in bankruptcy was in general terms, and it might well have been authorized by proof of any one or more of the other acts charged. The controversy here is not that in the original proceeding. The adjudication in bankruptcy stands admitted and uncontested, and, for aught the record shows, it may have proceeded upon a ground wholly disconnected from the acquisition of the homestead.

2. That the District Court did not disturb the finding of the referee that the bankrupt was guilty of fraud. Not so. All the evidence before the referee was certified to the court and examined by it *de novo*, with the result that the decision of the referee was reversed, and the land declared a homestead free of all claims of the trustee.

The conclusion of the court negatives the existence of fraud. All the evidence upon which the referee and the court acted is not before us, and we cannot say that they merely drew different legal deductions from undisputed facts. The record not showing to the contrary, there may have been a conflict in the evidence on the issue of fraud, and in that event a review could not be secured by petition to revise.

3. That the rule is that during the four months preceding the filing of a petition in bankruptcy the bankrupt holds his nonexempt property in trust for his creditors, and in case of breach of the trust the creditors or their representative—the trustee in bankruptcy—possess the usual remedies of *cestuis que trust* including the right to follow all such property wherever it can be discovered and identified in original or altered form. This is altogether a misconception. The bankrupt and his creditors sustain no such relation before the filing of the petition. Upon the appointment and qualification of the trustee, his title relates back to the time of the adjudication, and his rights and remedies as to property previously disposed of are definitely defined and limited by the bankruptcy act.

4. That, because the bankrupt accepted and disposed of two horses set off to him as exempt by the referee, he waived his right to complain of the referee's action as to the homestead. This contention is also erroneous. Though both matters were heard by the referee at the same time and were covered by the same order, they were wholly independent of each other. The case does not fall within the rule that an acceptance of the benefits of a decree or order precludes one from complaining of its burdens.

The petition to revise is denied.

(157 Fed. 80.)

SUN PUB. CO. v. LAKE ERIE ASPHALT BLOCK CO.

(Circuit Court of Appeals, Sixth Circuit. November 27, 1907.)

No. 1,643.

1. WRIT OF ERROR—REVIEW—QUESTIONS CONSIDERED.

That a verdict is against the weight of the evidence cannot be assigned as error in the federal courts.

2. SAME—QUESTIONS PRESENTED FOR REVIEW.

To entitle a party to assign as error, in an appellate court, that there was no evidence in support of the verdict rendered, the question must have been presented to the trial court by a motion for direction of a verdict, and due exception taken to its refusal.

3. SAME—ADMISSIBILITY OF EVIDENCE.

To render the rulings of a trial court, admitting or rejecting evidence, reviewable on a writ of error, the record must show an exception, taken to each ruling, assigned as error, and, where an objection was sustained to a question, the answer expected.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1503, 1504.]

4. SAME—PRESENTATION OF QUESTIONS TO LOWER COURT.

Where it was agreed between counsel that certain printed articles should be taken by the jury, error cannot be assigned because they were not so

taken, where no request therefor was made to the court, and consequently no ruling made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1418.]

5. SAME—REVIEW—DISCRETION OF LOWER COURT.

The refusal of a court to postpone a trial because of the absence of one of a party's counsel is discretionary, and not reviewable on a writ of error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3837.]

In Error to the Circuit Court of the United States for the Southern District of Ohio.

Allen Andrews and Miller Outcalt, for plaintiff in error.

Warren Gard, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. The plaintiff (now defendant in error) sued the defendant below to recover damages for the publication in the "Hamilton Sun" at Hamilton, Ohio, of an alleged false and malicious libel of and concerning the plaintiff's method of doing business, and the quality of the material which it supplied for the paving of streets in cities and villages, and particularly the material which it was supplying to one Andrews, who was about to put down a pavement in a certain street in Hamilton under a contract with the city. The libelous matter complained of was this:

"Awful. Of all the poor, worthless, rotten material that could possibly masquerade under the pretense of being paving material, the block asphalt piled upon East High street for use in paving that street, if the people can be gagged, is the worst. It stands no test at all. As a matter of fact, the chemical tests, the pressure tests, and the tests of common sense show that the 'new' block asphalt, piles of which are stacked upon East High street and Ross street, isn't as good as the old disgraceful, discredited, and disintegrating stuff that makes this town the laughing stock of the state now.

"Fraud. But the block asphalt that they are trying to put down on East High street and on Ross street, which is shown to be even poorer in quality than the old block, is but three inches thick and costs \$2.24 a square yard. Don't you know there is fraud sticking out of that? Don't you know that the court was deceived when the Scott case was heard?

"Common Sense. To Mr. Mather and Mr. Krone, members of the board of public service: The people are appealing to you to prevent the laying of this discredited and fraudulent material in this city. The asphalt block people have deceived you as well as the public. The contractor's purpose in putting down an inferior grade of three inch block here; not the block that they testified about in court—not the block that they represented to you."

The answer of the publishing company admitted the publication, but denied all other allegations of the petition, such as concerned the motive, the damages, and the falsity of the statements in the publication, which statements the defendant averred were true, and were a reasonable statement of facts which were of general interest to the public. There was a trial by a jury, which resulted in a verdict for the plaintiff in the sum of \$4,000. A motion for a new trial was made and denied. Thereupon judgment was entered on the verdict.

The case has been argued upon four assignments of error. In the

order pursued by counsel for the plaintiff in error, the first contention is that the verdict was manifestly against the weight of the evidence. In the appellate courts of the United States this cannot be assigned as error. It is a legitimate ground for a motion for a new trial in the Circuit Court; but its disposition there is final. Under this assignment, it is also urged that there was no evidence in support of a verdict and judgment for damages. But no foundation was laid in the court below on which to rest a complaint in the appellate court. There was no motion made at the close of the evidence for a peremptory instruction to the jury, or any request preferred to the court for any instruction upon the subject, and no exception taken to the instructions given to the jury. In this court only errors in law can be considered; and, in order to raise a question of the correctness of the rulings of the judge on the trial, an exception must be taken thereto at the time, and appear in the bill of exceptions. We may, without impropriety, add that, in the present case, whatever we might think of its sufficiency and weight, there was some evidence upon the question of damages which went to the jury for its consideration. Whether or not, in a case of this character, and constituted in respect of parties as this is, punitive damages are recoverable—a question much discussed by counsel for plaintiff in error in their brief—we do not inquire; for, although the court charged that the jury might give such damages, no exception was taken to the instruction.

One of the assignments of error complains of the action of the court in refusing to permit the witness Doran to answer the following questions:

“State to the jury, what proposition, if any, was made by the property owners to the board of public service at that meeting to join together and have a disinterested chemist employed to analyze these blocks?”

“You may state to the jury what was the appearance to you—to any casual observer—of High street, that had been paved a few years before with this block asphalt, sold by Mr. Birchenal to the city?”

—to which ruling the bill of exceptions states the defendant then and there excepted. There were two rulings, each rejecting particular questions relating to different subjects. To which ruling the exception relates does not appear. The eleventh rule of this court (150 Fed. xxvii) requires that the party assigning errors “shall set out separately and particularly each error asserted and intended to be urged”; and, “when the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected.” When the evidence is rejected, it is incumbent on counsel to make the record show that he stated to the court what answer he expected the witness would make; otherwise, it does not affirmatively appear that the party suffered any injury from not having the answer. Neither of these requirements have been complied with. Moreover, it appeared that the paving done in High street several years before was done with block asphalt supplied by another company having no relation to the plaintiff; and, although the same person who formerly acted as the agent of the other company was now acting as the agent of the plaintiff, this fact did not make the plaintiff responsible for the old paving, and would afford no justification

for impugning the character and business methods of the plaintiff, and the material supplied by it. It was *res inter alios*, and wholly irrelevant. Besides, the libel did not charge that the board of public service was acting fraudulently. The charge was that the plaintiff was the party committing the fraud by deceiving the board. Evidence that the board declined to co-operate in obtaining a chemical analysis was therefore irrelevant.

The plaintiff's counsel offered in evidence certain other publications by the defendant to show malice in publishing the libel complained of. Certain extracts were read by counsel, and counsel for defendant objected to the omission of the context, but finally waived the objection upon an agreement that the jury might take with them, when they should retire, the whole of the publications so offered. But, when the jury went out, these publications were not handed to them, perhaps by oversight of counsel for both sides. No request was made to the court in that behalf, and, of course, no order was made or exception taken. It is assigned as error that the publications were not sent out. But, as this was a privilege saved to the defendant, it was incumbent on its counsel to see that the advantage should be pursued. At all events, there is nothing in the episode which exhibits any error in law on the part of the court.

Another complaint is that the defendant was forced to go to trial without the assistance of one of its counsel. It had employed two firms of lawyers, one a local firm and the other from Cincinnati. The member of the latter firm who had been relied upon to assist in the trial, being ill, was not in attendance, but his partner and the local counsel were present when the case came on for trial. A postponement was asked for by the defendant; but the court being of opinion that the defendant was sufficiently represented by counsel, declined the request and the trial proceeded. Error is assigned upon this refusal to postpone. It was, however, a matter within the discretion of the court, and its action is not reviewable here on a writ of error.

The judgment of the Circuit Court must be affirmed, with costs.

(157 Fed. 83.)

ROSENTHAL v. PINE HILL CONSOL. MINING CO.*

(Circuit Court of Appeals, Ninth Circuit. November 4, 1907.)

No. 1,431.

EVIDENCE—BURDEN OF PROOF—NECESSITY OF COMPETENT EVIDENCE TO SUSTAIN.

In an action by a corporation against its agent to charge him with a balance of money advanced to him to be used for plaintiff and not accounted for, where the receipt of the sums alleged to have been so advanced was put in issue by defendant, the burden of proving such advances rested upon the plaintiff, and was not sustained by the introduction in evidence of defendant's account as shown on plaintiff's books, where its secretary testified that many of the debit items in such account were entered by him on hearsay and without any knowledge on his part as to their correctness; nor was the defendant in such case called upon to introduce evidence to impeach the correctness of such entries.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 116, 117.]

*Rehearing denied February 24, 1908.

In Error to the Circuit Court of the United States for the Northern District of California.

Edmund Tauszky, for plaintiff in error.

Bert Schlesinger and Peter A. Breen, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HUNT, District Judge.

GILBERT, Circuit Judge. On September 27, 1904, the defendant in error commenced an action against the plaintiff in error to recover the sum of \$9,410.61. It was alleged in the complaint that between September 28, 1901, and June 25, 1903, the defendant in error intrusted to the plaintiff in error, as its agent and superintendent, sums of money aggregating \$44,066.15, to be expended for its use and benefit in the development of certain mining properties, and that said money had not been all so expended, but that \$9,410.61 had been converted by the plaintiff in error to his own use. The answer admitted the receipt from the defendant in error of \$43,544.24 and no more. It denied the conversion of any portion of the same by the plaintiff in error, and alleged that on July 22, 1903, an account was stated between the plaintiff in error and the defendant in error concerning the matters referred to in the complaint, and upon such statement it was found that the plaintiff in error was not indebted to the defendant in error in any sum whatever, but that, on the other hand, the latter was indebted to the former in the sum of \$3,040.88, for which he demanded judgment. The jury returned a verdict against the defendant in this case for \$9,310.61, upon which verdict judgment for that amount was entered in plaintiff's favor, the verdict being based upon the testimony of the company's secretary to the effect that that was the difference between the amount of money the company had intrusted to the defendant and the amount of his disbursements according to the vouchers and receipts returned by him. The court below held, on a motion made for a new trial, that the verdict was contrary to the evidence, saying in its opinion:

"The books of account were admitted in evidence. On page 52 of the ledger the debits are \$36,345.69. The credits upon that page amount to \$34,732.18. This shows a debit balance against the defendant of \$1,613.51. On page 54 the defendant is charged \$7,740.46 and is credited with \$7,433, leaving a debit balance of \$237.46. The \$1,613.51 shown in the account of the defendant on page 52 and the \$237.46 shown in his account on page 54, make a total of \$1,850.97. I have concluded that the plaintiff is entitled, upon the proofs, to this amount, and no more. I quote from the testimony of J. Frank Mase as follows: 'Q. Do Plaintiff's Exhibit 412 and Plaintiff's Exhibit 411 contain the entries of each item for which you claim money was sent to the defendant? A. Yes. Q. Do those books contain entries of each item which was paid out by the defendant, and for which you claim you never received a receipt? A. Yes.' This testimony was supplemented by that of the defendant, who testified that he reported all the amounts paid out by him to the secretary at New York. The books, then, supplemented by the testimony of these two witnesses, were sufficient evidence to justify the jury in finding the amount above specified. Unless the plaintiff, by its attorneys, within five days, shall remit so much of the verdict as is in excess of \$1,850.97, a new trial will be granted. Upon it being made to appear that the plaintiff has remitted all over and above that amount within the time aforesaid, judgment will go for the plaintiff for the amount specified."

The judgment that had been entered upon the verdict was accordingly set aside and a judgment entered as directed by the court. The difficulty is that the uncontradicted testimony of the company's secretary is that a substantial amount of the debit items were entered by him in the books of the company against the defendant solely upon the unsworn statement of third persons that they had paid to him certain moneys for the company. The secretary knew nothing about the matter, and did not pretend to know anything. The defendant by his answer brought those debits in issue. It is true that this hearsay testimony was admitted without objection, and that the plaintiff in error in testifying in his own behalf made no denial of the receipt of the money, and made no reference to that branch of the case, but we are of the opinion that in the absence of some probative proof against him he was not called upon to adduce testimony upon the issue so raised. In *Wigmore on Evidence*, § 290, it is said:

"The opponent whose case is a denial of the other party's affirmation has no burden of persuading the jury; and therefore, until the burden of producing testimony has shifted, he has no call to bring forward any evidence at all, and may go to the jury trusting solely to the weakness of the first party's evidence. Hence, though he take a risk in so doing, yet his failure to produce evidence cannot at this stage afford any inference as to his lack of it; otherwise the first party would be evading his legitimate burden. This distinction has been recognized and is unquestionable; but it has been little developed in its application."

This doctrine is sustained in *Brill v. St. Louis Car Co.* (C. C.) 80 Fed. 909, and *State Bank v. Wooddy*, 10 Ark. 640.

The judgment is reversed, and the cause is remanded for a new trial.

(157 Fed. 85.)

GREENE v. AURORA RYS. CO.

(Circuit Court of Appeals, Seventh Circuit. September 6, 1907.)

No. 1,369.

EMINENT DOMAIN—REMEDIES OF PROPERTY OWNERS—RIGHTS IN STREET—INJUNCTION—PERSONS ENTITLED TO SUE.

The owner of a lot abutting on a street, with title in fee extending to the center of the street, subject only to the easement for street purposes, under the law of Illinois may maintain a suit in equity to enjoin a corporation from appropriating and using the street for railroad purposes, and the question whether the corporation is one to which the state statute has delegated the power to make such appropriation by condemnation proceedings may be raised and determined in such suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 789.]

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

Chester E. Cleveland, for appellant.

Charles P. Abbey, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge. The appellant, Edward B. Greene, filed a bill in the court below for injunctive relief against the appropria-

tion and use of his property by the Aurora Railways Company for railroad purposes, and this appeal is from a decree entered upon hearing of demurrer thereto dismissing the bill (as finally amended) for want of equity. The appropriation sought by the railways company is for right of way, for alleged commercial railway purposes, on Galena street, in the city of Aurora, Ill.; and the appellant owns an abutting lot, with title in fee extending to the center of such street, subject to the public easement of street use, which is included in the proposed taking for right of way without his consent. In various averments of the bill, both charter and ordinance authority to take and use the property for commercial railway purposes are distinctly challenged, and the pendency of condemnation proceedings therefor is averred in an amendment to the bill.

The question thus raised, of power conferred upon the railways company to appropriate this property for right of way, was the only one open to controversy, under the averments of the bill and admissions by demurrer; and the assumed delegation, through its charter, of the sovereign power of eminent domain, was clearly subject to challenge by the property owner. The sufficiency of this ownership of the fee in the street, to entitle the owner to equitable relief against invasion for other than street use, is settled in *Wilder v. Aurora, De K. & R. Elec. Trac. Co.*, 216 Ill. 493, 526, 75 N. E. 194, if questionable at any stage, under the decisions in that jurisdiction. It is there settled, as well, that a "commercial railroad" is not a street railroad, and its use of a street "constitutes a new and additional servitude upon the fee of the property owner to the center of the street." Under the general doctrine of equity the jurisdiction is unquestionable, with or without the pendency of statutory proceedings for condemnation, to ascertain whether power is vested in the railways company to thus take private property, and protect the owner against unauthorized invasion of rights therein, for which no defense or remedy at law is adequate. *Osborne v. Missouri Pacific Railway*, 147 U. S. 248, 258, 13 Sup. Ct. 299, 37 L. Ed. 155; *Bass v. Metropolitan West Side Elec. R. Co.*, 82 Fed. 857, 860, 27 C. C. A. 147, 39 L. R. A. 711.

When the bill was dismissed below, authority for such taking for use of the railways company appears to have been upheld by the city court of Aurora in several condemnation proceedings, including the case referred to as pending against the property in question, and appeals taken from judgments therein were undetermined by the Supreme Court of the state, when argument was heard in this court upon the present appeal. At the June session (1907) of the Supreme Court, however, an opinion was filed in these condemnation cases, consolidated under the title "*William E. Gillette and Consolidated Cases v. The Aurora Railways Company*" (Ill.) 81 N. E. 1005, which is decisive against the power so asserted to appropriate property, upon which the present decree rests. It is there determined "that the question whether there is any law under which it [the railway company] could exercise the powers assumed is open to question at all times when it attempts to exercise such power"; that the rule is settled in Illinois "that the questions whether the power has been delegated to the corporation, and whether the uses and purposes for which it is sought to be exer-

cised fall within the legislative grant, are proper subjects for judicial determination"; that the purported incorporation is under the general railway act, as a commercial railroad, and not under the act for incorporating street railroads; that such act requires designation in the articles of "fixed termini between places named" therein; that "here the articles provide for an indefinite number of lines from points within the city of Aurora to points outside"; that no such purpose is authorized by "the general act under which appellee is organized"; and that the railways company was without power to condemn, use, or take property for right of way purposes.

The appellant, therefore, is entitled to equitable relief, under the averments of the bill, and the decree of the Circuit Court is reversed accordingly, with direction to overrule the demurrer and proceed further in conformity with this opinion.

(157 Fed. 88.)

MACKIE-LOVEJOY MFG. CO. v. CAZIER.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1907.)

No. 1,361.

PATENTS—INFRINGEMENT—PROFITS AND DAMAGES RECOVERABLE.

The findings of a master as to the profits and damages recoverable from a defendant for infringement of the Cazier patent No. 696,940 for a trousers hanger *held* supported by the evidence.

[Ed. Note.—Accounting by infringer for profits, see note to *Brickill v. City of New York*, 50 C. C. A. 8.]

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

For former opinion, see 138 Fed. 654, 71 C. C. A. 104.

This suit originated at circuit by bill of equity filed by appellee, complainant in the court below, charging appellant, defendant in the court below, with infringement of claim 5 of letters patent of the United States No. 696,940, granted to Marion H. Cazier, April 8, 1902. The opinion of the Circuit Court was to the effect that the claim was not infringed, and a decree was entered ordering that the bill be dismissed for want of equity. Complainant appealed from that decree and the dismissal of the bill, and subsequently, on arguments and brief, this court reversed the decree of the Circuit Court with directions to such court to enter a decree in appellant's favor for an injunction and accounting. 138 Fed. 654, 71 C. C. A. 104. The case was referred to Harvey W. Booth, Esq., one of the masters in chancery of the Circuit Court for the Northern District of Illinois, to ascertain, take, state, and report to the court the number of infringing articles made by the defendant, and the gains, profits, and advantages which it had received therefrom, together with the damages suffered by complainant by reason of said infringement.

After due proceedings had, the master rendered his report, finding that the entire profits which had accrued to the defendant, the Mackie-Lovejoy Manufacturing Company, from the manufacture and sale of said infringing articles amounted to \$3,004.11, and awarded all of such profits to the complainant, and, in addition, held the defendant liable to complainant for damages suffered by reason of a reduction in the selling price of his articles on account of said infringement to the amount of \$2,092.81, total amount found for complainant being \$5,096.92. To this report defendant filed 15 objections, and after due consideration thereof the master, on October 6, 1906, overruled each and all of

said objections. On November 14, 1906, the defendant took exceptions to the master's report—19 in all—and the court below, after hearing arguments and briefs on behalf of both parties, affirmed said report, ordering, adjudging, and decreeing that the complainant have and recover said amounts as profits and damages from the defendant, and also pay to complainant the costs in said suit to be taxed, etc.

Thomas F. Sheridan, for appellant.

Joseph Cummins, for appellee.

Before BAKER and SEAMAN, Circuit Judges, and WRIGHT, District Judge.

WRIGHT, District Judge (after stating the facts as above). By a former opinion of this court (*Cazier v. Mackie-Lovejoy Manufacturing Company et al.*),¹ the validity of the patent of the appellee herein of the trousers hanger in question, and its infringement by the appellant, were established, and the decree then before the court was reversed, with directions to enter a decree in favor of the complainant below, for an injunction, and accounting. A decree was accordingly entered by the Circuit Court in conformity to the direction of this court, and the cause referred to a master in chancery to state the account. The master having stated the account of profits and damages against the defendant below, upon evidence taken before him, reported to the court, and, after having heard exceptions to such report, the court below overruled such exceptions, and approved the report of the master, and gave its decree accordingly against the appellant for the amount of profits and damages resulting from the infringement found by this court. From such decree, this appeal is prosecuted, and for its reversal it is insisted the respective amounts found by the master as profits and damages against the appellant, and neither of such sums, are supported by the competent evidence in the case.

We have carefully examined the evidence in the record, and considered the arguments made against the findings in view of all the evidence, and have reached the conclusion that such findings of the master are supported and justified by the competent evidence in the case. And, inasmuch as the reasoning by which we reach the conclusion relates to the analysis and balancing of the evidence, no necessity is discovered, nor would any good purpose be subserved by lengthening this opinion by producing such reasoning. The findings of the master, together with his reasons therefor, are set forth at large in the record, which after full hearing and argument the trial court approved, and we are satisfied the findings and reasoning of the master upon the facts in the case are warranted by the evidence, and are unwilling to disturb the same, and the decree of the Circuit Court will therefore be affirmed.

¹ 138 Fed. 654, 71 C. C. A. 104.

(157 Fed. 145.)

JOHNSTON v. CORSON GOLD MINING CO. et al.

(Circuit Court of Appeals, Ninth Circuit. November 4, 1907.)

No. 1,381.

1. LANDLORD AND TENANT—LEASE—TERM TO COMMENCE IN FUTURO.

A lease to commence in futuro is grantable, and the fact that a lease fixes a date in the future for the commencement of the term does not make it an executory, rather than an executed, contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 217.]

2. EQUITY—JURISDICTION—ADEQUATE REMEDY AT LAW.

A lessee of mining claims under an executed lease for a term to commence on a future date, on and after such date, although never having been in possession, may maintain ejectment against another claiming title who wrongfully withholds such possession, and, his remedy at law to obtain possession by such an action being complete and adequate, a suit in equity for that purpose and to establish his title cannot be maintained, even though other relief of an equitable nature is also prayed for, such as an injunction to prevent waste, an accounting, and the cancellation of instruments alleged to constitute a cloud on his title, which relief, if necessary or proper, must be sought by an ancillary suit in aid of his action at law.

3. QUIETING TITLE—REMOVAL OF CLOUD—NECESSITY OF COMPLAINANT'S POSSESSION.

A suit in equity cannot be maintained by one out of possession to determine title or right of possession to lands, or to remove a cloud from complainant's title against a claimant in possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, §§ 8-11, 44, 45.

Necessity of possession in suits to quiet title, see note to Jackson v. Simmons, 39 C. C. A. 522.]

Appeal from the District Court of the United States for the Second Division of the District of Alaska.

Appeal from a judgment dismissing an action brought on the equity side of the District Court of the District of Alaska, Second Division. Plaintiff's bill alleges substantially these facts: That prior to and on May 9, 1906, the Universal Mining Company was and is the owner of certain described mining claims in the Nome District of Alaska; that it became owner by a deed of conveyance duly made and delivered to it by the defendant Corson Gold Mining Company, dated January 17, 1906, and filed for record in the proper district on April 24, 1906; that title to the said mining claims held by the Corson Gold Mining Company before the delivery of the deed to the Universal Mining Company was a possessory mining title, by force of location theretofore made, and subsequent conveyances to the said Corson Gold Mining Company of an undivided half of each and all the described properties, the said Corson Gold Mining Company having had prior to the delivery of the deed, and the said Universal Mining Company having thence had, the legal title to an undivided half of part of said properties, and the equitable title to a part thereof; that about May 9, 1906, at Manchester, N. H., the defendant Universal Mining Company, on the one side, and the plaintiff Johnston on the other, entered into a lease, whereby the Universal Mining Company leased its right and title to the properties involved in this suit to the plaintiff; that the lease recited that the Universal Mining Company owned a half interest in the property, and that the other undivided half belonged to one Gray, the Universal Mining Company expressly recognizing the rights of its co-tenant; that the right of entry in and upon the mining properties for the purpose of prospecting and mining gold was given; that the lease contained the following provision as to possession and terms: "It is also understood and agreed

between the parties hereto that the term of this lease shall be for the period of two years beginning the 1st day of July, 1906; provided, however, that if for any reason said party of the first part shall be unable or shall refuse on said 1st day of July to deliver to the said second party herein possession of said properties, as contemplated in this lease, then, and in that case, such delay in delivery of possession shall not work an abridgment in the term of this lease, but shall operate merely to defer the date of its commencement until such date as possession may be delivered as aforesaid. The said lessor covenants and agrees to use all reasonable endeavor and legal means to put the lessee in possession of the premises above described on said 1st day of July, 1906, or as soon thereafter as possible;" that the lessor also agreed that it would not interfere with possession by the lessee as contemplated by the lease.

Plaintiff alleges that the lease was recorded in Nome on June 21, 1906, and that it has been in force ever since the execution and delivery of the same; that about June 10, 1905, at Manchester, N. H., one E. W. Spurr purported to execute, under the seal of the Corson Gold Mining Company, and as its president, a certain lease between the said Corson Gold Mining Company, defendant herein, and one Judson T. Webster, also a defendant herein; that this lease was for the same properties involved in this action; that Spurr had no authority to execute or deliver such a lease; that Webster, the lessee named therein, refused to accept the lease as drawn, signed by Spurr, or to act in accordance with the terms thereof; that between the time Webster received the lease in June, 1905, and March 16, 1906, Webster, without the consent or knowledge of the Corson Gold Mining Company, made material alterations in the lease; that Webster affixed his signature to the duplicates of the purported lease; that between September 25 and December 15, 1905, Webster sent one of the duplicates of the said purported lease, so altered by him, to an agent of his in Nome, together with a sublease from himself (Webster) to Thomas M. Gibson, a defendant herein; that the sublease covered the mining claims involved herein, together with certain other properties, and included an assignment from Webster to the said Gibson of the purported lease to the said Webster of the properties embraced in the sublease; that about December 8, 1905, Webster sent back one of the duplicate copies of the said purported lease, so altered and signed by him, to the attorney of the Corson Gold Mining Company at Manchester, with the request that the company consent to and ratify the alterations made by him in the purported lease, saying that he could not accept the said lease unless said changes therein were made, but that on December 12th the stockholders of the Corson Company considered the changes and the request of Webster, repudiated the transactions had by Spurr with Webster, and withdrew all offers of a lease to him, and notified Webster about December 13, 1905; that notwithstanding these things, Webster at some time between September 25, 1905, and March 16, 1906, delivered to the said defendant Gibson the duplicate of the said pretended lease, and the sublease and assignment, and Gibson put the same on record on March 16, 1906; and that all these things were done without the consent or knowledge of the Corson Gold Mining Company, or its officers or successors; that the defendant Gibson and the defendants Waskey and Harding, claiming an interest with Gibson, by force of transfer by him under the said purported lease, and the said sublease, entered upon the mining properties involved, in May, 1906, claiming the right to do so by virtue of the said unauthorized and fraudulent lease, and the said sublease and assignment, and began working upon the claims, and were working upon them when this action was brought, and had taken from them large quantities of gold. Plaintiff alleges that since July 1, 1906, when the terms of his said lease began, he has tried to enter peaceably upon the properties embraced in his lease, and has demanded possession thereof from Gibson, Waskey, and Harding, who were occupying and working the same, but that they refused to surrender possession, or to permit him to enter for the purposes of his said lease, or for any purpose; that the co-tenant Gray is not in possession exclusively or adversely to plaintiff or to plaintiff's lessor, nor is he mining the properties, and he does not oppose entry and mining by plaintiff; that defendants Gibson, Waskey, and Harding are accountable for all gold taken from the mining claims since July 1, 1906, or that may be taken

therefrom by them hereafter, prior to the termination of plaintiff's lease, but plaintiff, not having access, cannot ascertain the true amount of gold that has been taken; and that the defendants last named have no right of claim or possession to the said mining properties other than the void and pretended lease. It is then alleged that the defendant Willey, prior to the making of the lease to the plaintiff Johnston by the defendant Universal Mining Company, was the controlling stockholder of said corporation, and alone conducted on its part the negotiations which resulted in the making of the lease to plaintiff, and assented to the same, but that at the time of the commencement of this suit he was publicly stating that plaintiff's lease was of no validity, and that, by dealings between himself, as president of the Universal Mining Company, and himself individually, he has obtained a deed of conveyance from the company to himself individually of all of the mining claims embraced in the lease to this plaintiff Johnston, and that this deed was made without authorization by the stockholders or directors, and that if it is put on record, it will operate to cloud and embarrass plaintiff's title to his leasehold interest in the said mining property; that since July 1, 1906, when the term of the plaintiff's lease began, plaintiff has demanded of Willey, as president of the corporation, that the company and Willey, as president, put him in peaceable possession of the mining properties, in fulfillment of the covenants of the lease; but that Willey has failed to take any steps to that end, but is combining with the defendants Gibson, Waskey, and Harding to leave them in the possession and enjoyment of the properties under the alleged void lease to the defendant Webster; that the record of the void lease to Webster, and Webster's sublease and assignment to Gibson, constitute a cloud upon plaintiff's title to his leasehold interest; that the defendants are not responsible financially for the value of the gold taken or to be taken; that the occupation by Gibson, Waskey, and Harding, and the taking of gold from the claims, and the exclusion of plaintiff therefrom, constitute great and irreparable injury, for which plaintiff has no adequate remedy at law; that plaintiff at great expense prepared to mine the claims from and after July 1, 1906; that the open working season is a brief one; and if the defendants shall be left in possession the claims may be wholly worked out before final decree can be obtained; and that plaintiff will be put to great additional expense unless he can enter upon and operate the claims under his lease. Plaintiff asks for a decree in his favor, adjudging that the Universal Mining Company, when it made and delivered its lease to plaintiff, was the owner of the legal possessory title to the properties described in the lease; and that on July 1, 1906, he became lawfully entitled to the possession of the properties in co-tenancy with Gray; and that the pretended lease from the defendant Corson Gold Mining Company to Webster was not authorized, and was materially altered prior to delivery without the consent of the Corson Gold Mining Company, and was and is null and void; that the defendants Webster, Gibson, Waskey, and Harding have no right under said pretended lease to the possession of the said properties, and that they have never acquired any rights by any lease or sublease, or assignment, but that the said instruments are clouds upon plaintiff's title to his leasehold interest. Cancellation of the alleged pretended lease to the defendant Webster, and the sublease thereunder, and the partial assignment to Gibson, is prayed for, and a decree is asked enjoining Gibson, Waskey, and Harding from continuing to occupy the claims, and from extracting gold therefrom, and compelling them to surrender possession to plaintiff, and requiring them to account for gold extracted; and that defendant Willey be restrained from disparaging plaintiff's title, and that he may deliver into court deeds, purporting to convey from the Universal Mining Company to himself the said mining property; and that, until final decree, restraining order be issued.

A temporary restraining order was issued, and a motion for preliminary injunction was heard. The plaintiff filed several affidavits tending to substantiate the allegations of his complaint. The defendants also filed affidavits denying plaintiff's allegations as to title, and setting forth that they had been in possession since March, 1906, and had redeemed the property from a foreclosure at an expense of \$10,000, and thereafter had spent large sums upon it; and that they claimed title and possession in good faith. The defendants Gibson, Waskey, and Harding filed a demurrer to the application for an injunction,

on the ground that plaintiff did not state a cause of equitable cognizance as against them. The demurrer was sustained, and injunction pendente lite was denied, for the reason that the plaintiff was not entitled to relief in equity. The bill was dismissed as against appellees, without prejudice to maintenance by plaintiff of an action at law.

Thomas R. Shepard, Shepard & Flett, and W. H. Flett, for appellant.

Charles S. Wheeler, J. F. Bowie, Gordon Hall, and Albert Fink, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HUNT, District Judge.

HUNT, District Judge (after stating the facts as above). The important question is whether plaintiff had a plain, adequate, and complete remedy at law. If he had, then the lower court properly refused to entertain his bill as one entitling him to equitable relief, at least until after he had instituted his legal action. We have plaintiff, a lessee out of possession, knowing that defendants, third persons, were in possession, mining the property involved, and claiming right of possession, now suing in equity to establish title, to acquire possession, to cancel an instrument and remove a cloud, for an accounting, and for injunction to prevent further mining. The complaint sets forth facts which, being taken to be true, show appellees to be naked trespassers—that is, that they went upon and hold possession of the property without title, legal or equitable, in themselves or their predecessors, while plaintiff shows that he is a lessee of the owners of both legal and equitable title, and that his right of possession began on July 1, 1906, but that he has been wrongfully excluded from the property by these appellees. The contract under which plaintiff claims was an executed lease, containing among others this clause:

"Witnesseth: That for and in consideration of the rents, royalties, covenants, and agreements to be paid and performed by the said party of the second part, the said party of the first part has agreed to lease, demise, and let, and does hereby lease, demise, and let, to the said party of the second part all its right, title, and interest in and to the properties and mining claims hereinafter specifically described."

The proviso (heretofore quoted in the statement preceding this opinion), assured the enjoyment of the property by plaintiff for the full period of two years, but it did not change the character of the conveyance by making it an executory, rather than an executed, contract. A lease to commence in futuro is grantable. *Whitney v. Allaire*, 1 N. Y. 305; *Becar v. Flues*, 61 N. Y. 518. The lessee acquired an interest in the term, which he could assign, and for which he could maintain ejectment without any further act upon his part, if possession was withheld after his right of entry became complete. If the plaintiff's lessor had been in possession on July 1, 1906, and for any reason had refused to surrender possession to plaintiff, such refusal would not have operated to defer plaintiff's right of possession, notwithstanding plaintiff's enjoyment might have been postponed, and his term of two years might not have begun until after he obtained actual possession. This construction of the lease is reasonable, and appears to be in har-

mony with the whole instrument, for in another part thereof the lessor covenanted and agreed with the lessee that he would use all reasonable endeavor and legal means to put the lessee in possession "on said 1st day of July, 1906, or as soon thereafter as possible." Any doubt upon this point, however, has been resolved by the pleading of plaintiff, which is framed upon the theory that plaintiff's right of possession accrued July 1st. He claims not under an agreement for a lease, but under an existing lease, and he asks for mesne profits from July 1, 1906—profits to which he would have no claim unless his right of possession accrued at that specified date.

The estate of plaintiff as a lessee could only have been perfected by his entry, but after July 1, 1906, which was the date alleged by plaintiff for the commencement of the term, his interest as lessee was such that, though not in actual possession, still he had a present interest in the term, and could maintain ejectment. *Wood's Landlord & Tenant*, p. 266; *Tyler on Ejectment*, pp. 75, 77; *Van Rensselaer v. Slingerland*, 26 N. Y. 580; *Adams' Equity*, p. 217. In *Trull v. Granger*, 8 N. Y. 115, the right of possession in *præsenti* was held to be all that was necessary to maintain ejectment, and an entry is not necessary. And in *Gardner v. Keteltas*, 3 Hill (N. Y.) 332, 38 Am. Dec. 637, it was held that ejectment would lie by a lessee before entry against a stranger in possession, and wrongfully withholding from plaintiff. Plaintiff being out of possession with a right of action in ejectment, his remedy was complete and adequate against those in possession, it being indisputable that ancillary suit could be brought upon the equitable side of the court to restrain waste or destruction of the estate, pending the hearing and determination of the action at law. *Erhardt v. Boaro*, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1113; *Id.*, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. Ed. 1116.

Where there is a legal title, and one who holds it is kept out of possession by defendants holding adversely, the remedy is at law to recover possession. "Equity in such cases has no jurisdiction, unless its aid is required to remove obstacles which prevent a successful resort to an action in ejectment, or when, after repeated actions at law, its jurisdiction is invoked to prevent a multiplicity of suits, or there are other specific equitable grounds of relief." *United States v. Wilson*, 118 U. S. 86, 6 Sup. Ct. 991, 30 L. Ed. 110; *Harland v. Bankers et al.* (C. C.) 32 Fed. 305.

Plaintiff doubts whether ejectment would lie, saying that "it is very questionable whether if plaintiff should attempt to proceed in ejectment he would be able to maintain his action." That ejectment ordinarily affords ample remedy to recover mesne profits cannot be disputed; that it affords ample remedy to recover possession cannot be disputed; and that damages can be recovered in ejectment is also certain. His doubts must therefore rest upon the apprehension that in this particular case the law cannot give him all the relief he needs, because, in addition to the several kinds of relief just enumerated, he must have a decree of cancellation of the fraudulent and altered lease to Webster, and a decree of removal of the cloud created thereby upon his title, and because he must have injunction from further trespass in operating the property. It is this full relief that he prays,

seeking to justify his prayer upon the ground that, where equity takes jurisdiction, it will give such full relief, whether legal or equitable, as to all matters relating to the subject-matter of the bill, even though relief is granted in matters which would not have been the subject of equitable interposition, had they alone been the original subjects of the relief sought. Plaintiff has cited decisions holding that a bill to remove a cloud will lie, though plaintiff is out of possession, where his legal remedy is not adequate, and that ejectment is an inadequate remedy in all cases where, although plaintiff might recover possession, a void instrument or muniment of title would be left outstanding and uncanceled. *Bunce v. Gallagher*, 5 Blatchf. 48, Fed. Cas. No. 2,133, and *Sayers v. Burkhardt*, 85 Fed. 246, 29 C. C. A. 137, decided by the federal courts, are construed to sustain this proposition. The latter was a case where the object of the suit was to remove a cloud, and to set aside as fraudulent certain proceedings had in a state court, and to declare the same null and void. But the weight of decision by the federal courts is against the doctrine that appellant relies upon, in that it is well established that, where plaintiff is not in possession, and defendant is, a suit to quiet title is not within the jurisdiction of a court of equity, where other relief as well is sought. And this is true, even though a number of additional reliefs are prayed for, part of which may be included within the jurisdiction of equity.

Smyth v. N. O., C. & B. Co., 141 U. S. 656, 12 Sup. Ct. 113, 35 L. Ed. 891, cited in the opinions of many courts, is a leading case. Complainant there went into equity, asking that his title be adjudged valid, and for possession, and for rents and profits. In the bill it was alleged that certain proceedings taken by the land department of the government were invalid, and that because of the invalidity of the proceedings, complainant's right was not defeated or impaired. The prayer also asked that complainant might be declared to be the owner, and put in possession of the premises described, and have an accounting for rents and profits. An examination of the brief for the appellant in that case shows that it was forcibly urged upon the court that the bill should be maintained in equity, because there was not an adequate remedy at law, and because fraud was charged which prevented complainant from completing his title to a portion of the lands, and that a multiplicity of suits would be necessary, and that his title was threatened, and that it was the province of a court of equity to stop these acts, investigate the frauds, compel an accounting, and that equity alone could afford adequate relief. But Justice Field, for the court, said that notwithstanding the statements of the bill respecting the alleged illegal and fraudulent use of certain ancient grants, and the alleged illegal proceedings of the department, the bill averred possession by complainant of a legal title. Continuing, he said:

"Whether that title can be enforced against other claimants will depend of course upon the validity of the ancient grants produced, and of the proceedings by which Louisiana is alleged to have acquired the property. That can be shown in an action at law, as well as in a suit in equity."

It was further held that the allegations as to the illegality of the action of the land department, and the fraudulent proceedings of the

defendants in bringing forward the pretended ancient grants, were entirely unnecessary to the maintenance of the action, as the facts upon which title to the premises rested could be readily shown in an action at law. It was said that all the facts and questions necessary to determine the right to the property could be considered and disposed of in a single action at law, and allegations of fraudulent proceedings, respecting the acquisition of the title, did not convert the action at law into a suit in equity. *Boston & Montana Min. Co. v. Mont. Ore. Pur. Co.*, 188 U. S. 632, 23 Sup. Ct. 434, 47 L. Ed. 626.

In *McGuire v. Pensacola City Co. et al.*, 105 Fed. 677, 44 C. C. A. 670 (1901), the Court of Appeals of the Fifth Circuit dismissed a bill, where the plaintiff sued in equity, praying for an injunction to restrain defendants from interfering with certain lands, or committing trespass thereon, for a receiver, for an account as to rents and profits; that the title be quieted; and that a tract of land be decreed to belong to plaintiff, together with rents and profits. The decision was that there was nothing alleged to confer jurisdiction, although the bill showed that the complainant had a legal title to the land, and that defendants had obtained possession by force, and were in possession. It was held that if the defendants were trespassers they could be joined as defendants in an action in ejectment, and that the equitable jurisdiction would not be interposed to prevent a multiplicity of suits, as each defendant had a right to submit his claim of title and right to possession to a jury. It was also argued that the court had jurisdiction in equity to inquire into the allegations made of conspiracy, fraud and violence. But the court said:

"The fact that the defendants conspired to obtain possession of the land, or committed frauds and violence to obtain possession, the complainant having the legal title and the right to possession, does not confer jurisdiction in equity of a suit to recover the lands. These wrongs on the part of the defendants do not prevent the plaintiff from recovering the lands at law in ejectment. Such averments in a bill to recover real estate and its rents, brought by a plaintiff out of possession, and having the legal title against defendants in possession, do not confer jurisdiction in equity. *Smyth v. Banking Co.*, 141 U. S. 656, 660, 661, 12 Sup. Ct. 113, 35 L. Ed. 891. The averments that the defendants hold the lands under void judgments are without effect as conferring jurisdiction, because the judgments could as well be held void at law. *Smyth v. Banking Co. (C. C.)* 34 Fed. 825; *Lewis v. Cocks*, 23 Wall. 466, 469, 23 L. Ed. 70."

To the contention that the court had jurisdiction to quiet title from the cloud resting upon the land by the acts of the defendants, the court replied that it was well settled "that a plaintiff not in possession, having the legal title, cannot maintain a bill against defendants who are in possession to remove cloud from title."

In *Hanley v. Coal Co. (C. C.)* 110 Fed. 62 (1901), the relief sought was a decree establishing a right and title of plaintiff to the possession and use of lands, that a trustee be appointed to carry into effect a last will and testament, that an accounting be had, and for judgment and general relief. Judge Rogers decided that a court of equity will not take jurisdiction, at the instance of a plaintiff out of possession, to determine as between such plaintiff asserting title and a defendant in possession claiming adversely the simple and naked questions of

who holds the legal title to the land or the right to the possession thereof. He continued:

"Nor is authority required to show that in such a case as that the equity jurisdiction of the federal court would not attach because facts are stated in the bill which, in a proper case, would give the court jurisdiction, on the ground of an account between the parties, for the reason that an accounting depends upon the title or right to possession, and the jurisdiction to try the title is in a court of law. Rev. St. U. S. § 723, [U. S. Comp. St. 1901, p. 583] article 7 of the Constitution of the United States. See, also, cases cited in volume 2 of the notes of Gould & Tucker to Rev. St. U. S. § 723. Nor can the equity jurisdiction of a federal court attach to quiet title in favor of a plaintiff who is either out of possession or has not acquired the legal title, as against a defendant in possession asserting adverse title. *Frost v. Spitley*, 121 U. S. 552, 7 Sup. Ct. 1129, 30 L. Ed. 1010; *Dick v. Foraker*, 155 U. S. 404, 15 Sup. Ct. 124, 39 L. Ed. 201; *Adoue v. Strahan* (C. C.) 97 Fed. 691."

In *Bearden et al. v. Benner* (C. C.) 120 Fed. 690 (1903), the prayer was that complainants' title be decreed and confirmed, that a certain deed be decided to have only conveyed a life estate, that, if necessary, the deed be corrected and reformed, and thus a cloud be removed from complainants' title; that an account be had, and an order of sale be made, and that the proceeds be paid over to complainants; and that a preliminary injunction issue restraining defendant from selling or incumbering the interests claimed by the complainants. The court treated the bill as one showing that the possession of the land in dispute was held adversely to complainants, and under a claim of title to the fee in defendant. Jurisdiction was denied, the rule being upheld that "those only who have a clear legal and equitable title to land connected with possession have any right to claim the interference of a court of equity, to give them peace or dissipate a cloud on the title." Jurisdiction was also refused, notwithstanding the alleged necessity for an accounting; the court quoting from the leading case of *Hipp v. Babin*, 19 How. 271, 15 L. Ed. 633, where Justice Campbell, for the Supreme Court, laid down the rule that, when a party has a right to a possession which he can enforce at law, his right to the rents and profits is also a legal right, and must be enforced in the same jurisdiction. Furthermore, Judge Speer held that although the bill might have been maintained under the practice of the state of Georgia, yet that the courts of the United States, being controlled by the Constitution and the acts of Congress, cannot deprive a person of his right to a trial by jury in an action at law.

In *United States Mining Co. v. Lawson et al.* (C. C.) 115 Fed. 1005 (1902), Judge Marshall very clearly reviews the principal cases bearing upon the question under consideration. That was a bill brought for an injunction to restrain defendants from working on plaintiff's mining claim, and that the title of the plaintiff be quieted. The action was looked upon by the learned judge as maintainable under the statutes of the state of Utah, but, after reference to the seventh amendment to the Constitution of the United States, and to section 723 of the Revised Statutes, providing that suits in equity shall not be sustained in the federal courts where a plain, adequate, and complete remedy at law may be had, it was pointed out that there was no averment that the plaintiff was in possession, but that it appeared that the title

of the plaintiff was a legal one, and that if defendants were in possession the property could be recovered, and the title could be determined in an action of ejectment. The court said:

"It is a familiar rule that, where a part of the relief to which plaintiff is entitled is equitable, a court of equity, having jurisdiction for this purpose, will ordinarily assume jurisdiction of the entire case, and grant both the legal and equitable relief that the case demands. It is no less well settled that the right to an injunction to prevent the continuance of a wrong may be a sufficient equitable incident to give a court of equity jurisdiction of what would otherwise be a legal action. *Root v. Railroad Co.*, 105 U. S. 207, 26 L. Ed. 975; *Jesus College v. Bloom*, 3 Atk. 262; 1 Pom. Eq. Jur. § 236. To have this effect, however, the equitable relief must be something more than simply in aid of a legal action or during its pendency. Courts of equity do not usually undertake to try disputed legal titles to land. *American Dock & Improvement Co. v. Trustees for Public Schools*, 37 N. J. Eq. 266. And before a plaintiff is entitled to a permanent injunction restraining the violation of a common-law right, he must ordinarily establish this right at law. *Coke Co. v. Broadbent*, 7 H. L. Cas. 601, 606. In the federal courts, at least, it is common practice to proceed in equity for an injunction to preserve real property pending legal proceedings for the determination of the title. *Erhardt v. Boaro*, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 7113; *Waterloo Min. Co. v. Doe*, 82 Fed. 45, 27 C. C. A. 50; *St. Louis Min. & Mill. Co. of Montana v. Montana Min. Co.* (C. C.) 58 Fed. 129; *Stevens v. Williams*, 5 Morr. Min. Rep. 449."

Decisions within this circuit are to the same effect. In *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230 (1901), the prayer was for a temporary injunction restraining defendants from boring wells and removing oil, and for a decree that complainant had full, complete, and equitable title to the premises involved, that a receiver be appointed, and that adverse claims of defendants be adjudged without right. This court held that the circuit court had no jurisdiction to try the title to the property, or to judge the complainant to be entitled to the possession thereof. The cases of *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873, and *Black v. Jackson*, 177 U. S. 349, 20 Sup. Ct. 648, 44 L. Ed. 801, were quoted from, to sustain the general rule that equity will not proceed to determine title or right of possession to lands brought by one who is out of possession against a claimant in possession. *Davidson v. Calkins* (C. C.) 92 Fed. 230, wherein Judge Wellborn ably reviews the decisions of the Supreme Court, was cited with approval. *Cal. Oil & Gas. Co. of Ariz. v. Miller et al.* (C. C.) 96 Fed. 12.

In *Morrison v. Marker* (C. C.) 93 Fed. 692 (1899), a decree was asked adjudging a deed to be fraudulent and void, and that it be canceled, that complainant be adjudged to have a good and valid title, and that the title of complainant be quieted. Judge Morrow, sitting in the Circuit Court, decided that there was not a case stated within the equity jurisdiction of the court, and quoted with approval from *Frost v. Spitley*, 121 U. S. 552, 7 Sup. Ct. 1129, 30 L. Ed. 1010, where it was held that a person out of possession cannot maintain a bill to remove a cloud upon title, and to quiet the possession of real estate, whether his title is legal or equitable, for if his title is legal, his remedy is by action of ejectment, and, if equitable, he must acquire the legal title, and then bring ejectment.

In *Northern Pacific Railroad Company v. Amacker*, 49 Fed. 529, 1

C. C. A. 345, this court again sustained the general rules as heretofore stated. That was a suit seeking a decree declaring that defendants had no estate in certain lands claimed by the complainant, that the title of the complainant was good, and praying that the defendants be enjoined from asserting claim to the lands, adverse to the complainant. Equity jurisdiction was denied. To like effect is *Southern Pacific Railway Co. v. Goodrich* (C. C.) 57 Fed. 879 (1893).

Similar questions were also involved in *Empire State, Idaho M. & D. Co. v. Bunker Hill S. M. & C. Co.*, 121 Fed. 973, 58 C. C. A. 311 (1903). Bill in equity was brought by the Empire State Company to quiet title to a certain mining claim. The controversy related to extralateral rights. It was contended that possession of the property did not appear to be in the appellee, but the bill alleged that the appellee was in possession of all of the lode or vein, which extended beyond a certain plane, and within vertical planes of projected end lines. The court expressly regarded that as an averment of possession of all that part of the lode which was in controversy, and, when the point of possession was settled, proceeded to show that a trespass and threat to continue to extract ore were alleged, wherefore it was held equity would intervene.

Among the decisions by courts of the states, that of *Mary Ann Long's Appeal*, 92 Pa. 171, bears closely upon the case under consideration. There the subjects of the bill in equity were leasehold estates. Fraud and conspiracy were set up, and nine kinds of relief were asked, including injunction, accounting, and that the interests claimed by plaintiff be declared his. The court held the case as properly in ejectment, looking upon it as one where plaintiff was really seeking to establish his title against defendant in possession. "Her title," said the court, "may be worthless, but she has possession, and until he proves, by an action at law, that he has the right to that possession by virtue of good title, she cannot be disturbed." *Haggin v. Kelly*, 136 Cal. 481, 69 Pac. 140.

Appellant relies largely upon the recent case of *Big Six Development Co. v. Mitchell*, 138 Fed. 279, 70 C. C. A. 569, as being direct authority that equity will retain his bill. The facts there presented an unusual case for injunctive relief, and the court, Judge Hook dissenting, held that as the injury was to the res, equity had jurisdiction not only to restrain waste or threatened trespass, but having acquired jurisdiction might proceed "to settle the question of title, and to remove the cloud." The doctrine thus expressed was applied to a very unusual condition of facts, and unless its meaning is circumscribed by the peculiar features of the case, it would appear to be an extension of equitable jurisdiction beyond the rule of decision of this circuit, and of other circuits, as laid down in *Kellar v. Craig*, 126 Fed. 630, 61 C. C. A. 366, and other federal cases already cited.

It results from what we have said that, inasmuch as plaintiff has a complete remedy at law, his position invoking the general equity powers of the court cannot be upheld. *Bruce v. Murray*, 123 Fed. 366, 59 C. C. A. 494. Manifestly, the principal issue involved in the case, and the one that should be first tried, is right of possession against defendants in possession, and defendants have a right to stand on their pos-

session until compelled to yield to better title, and to demand trial by jury as to whether plaintiff has a true title. *Fussell v. Gregg*, 113 U. S. 554, 5 Sup. Ct. 631, 28 L. Ed. 993.

As plaintiff claims no special rights under the Alaska Codes, other than such as he is entitled to under general equitable principles, which it may be assumed are not narrowed by the Codes, it is unnecessary to consider the argument of the appellees to the effect that under Alaska Code Civ. Proc. §§ 301, 475, courts of equity will not determine questions of title and right of possession at the instance of one out of possession, in an action brought by such person against one in possession.

The order dismissing the bill without prejudice to an action at law is affirmed.

(157 Fed. 155.)

PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA v. WEBB.

(Circuit Court of Appeals, Eighth Circuit. November 6, 1907.)

No. 2,563.

1. RELEASE—RELEASE AS DEFENSE—FRAUD WHICH WILL AVOID RELEASE AT LAW.

The only fraud which may be availed of in an action at law in a federal court to avoid a formally executed release of the claim sued on is misrepresentation, deceit or trickery practiced to induce the execution of a release which the signer never intended to execute and upon which the minds of the contracting parties never met, and does not include any of those misrepresentations of fact which may have been resorted to in order to persuade the claimant to agree to the release as actually made. In such respect it is immaterial whether the release is or is not under seal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Release, § 32.]

2. COURTS—FEDERAL COURTS—EQUITABLE DEFENSE IN ACTION AT LAW.

In the federal courts, the rule subsists that the distinction between legal and equitable defenses is always recognized, and such rule cannot be affected by state legislation or practice permitting equitable defenses in actions at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 912, 913.]

3. RELEASE—DEFENSE IN ACTION AT LAW—PLEADING IN AVOIDANCE—FRAUD.

In an action on an accident insurance policy in which a formal release of the claim executed by defendant for a stated consideration was pleaded as a defense, a replication which in effect denied that plaintiff executed a release but alleged that if she did it was procured by fraud and deceit in that defendant's agents represented to her that defendant was not liable on the policy and read affidavits to her purporting to state facts, known to them to be untrue, in support of such representation, whereby she was induced to accept a sum of money from defendant which purported to be a gift, does not state such a case of fraud as would avoid the release at law.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

James C. Jones (Jones, Jones, Hocker & Davis, on the brief), for plaintiff in error.

Frederick H. Bacon, for defendant in error.

Before VAN DEVANTER and ADAMS, Circuit Judges, and RINER, District Judge.

ADAMS, Circuit Judge. This was an action at law on a policy insuring Margaret Webb, the plaintiff below, in the sum of \$4,000 against death of her husband as a result of external, violent, and accidental means. Defendant company amongst other defenses pleaded accord and satisfaction, and in consideration thereof the execution by plaintiff of a written release of any and all claim against it by reason of the death of her husband. Plaintiff in her reply denied any knowledge or recollection of having executed the release, but pleaded hypothetically that if such release was executed by her it was procured by defendant's agent by "fraud, deceit, and misrepresentation of facts, and was for that reason without consideration and void." On these pleadings the case went to trial. A paper consisting of the acknowledgment of receipt of \$300 in full compromise and settlement of the demand sued for in this action and an unequivocal and formal release and discharge of defendant from any and all liability for that demand was shown in evidence to have been executed by plaintiff and delivered to the defendant in consideration of the payment by the latter to the former of the agreed consideration. In view of that proof, and at the close of all the evidence, defendant requested the court to instruct the jury that plaintiff could not recover. Upon a refusal to so instruct, and after exception had been saved thereto, defendant moved the court to exclude from the consideration of the jury all evidence given in support of the replication. The court overruled that motion, and defendant duly excepted. Verdict and judgment in favor of the plaintiff followed, and the case is brought here by writ of error for review.

Whether the formal release was, until set aside by a proceeding in equity, a bar to the present action at law, is a question which underlies all others and which we will first dispose of. Our attention is called to many cases on the general subject that fraud vitiates all contracts and to some which hold that a release may be shown even in actions at law to have been procured by fraud and misrepresentation and its effect thereby avoided. But it is unnecessary and unprofitable to dwell long on those cases. The Supreme Court of the United States has authoritatively settled the matter. *Hartshorn v. Day*, 19 How. 211, 15 L. Ed. 605; *George v. Tate*, 102 U. S. 564, 26 L. Ed. 232; *Union Pac. Ry. v. Harris*, 158 U. S. 326, 15 Sup. Ct. 843, 39 L. Ed. 1003; *Texas & Pac. Ry. Co. v. Dashiell*, 198 U. S. 521, 25 Sup. Ct. 737, 49 L. Ed. 1150. In *Hartshorn v. Day*, Mr. Justice Nelson, speaking for the court, said:

"Fraud in the execution of the instrument has always been admitted in a court of law, as where it has been misread, or some other fraud or imposition has been practiced upon the party in procuring his signature and seal. The fraud in this aspect goes to the question whether or not the instrument ever had any legal existence. * * *"

In *George v. Tate* the Supreme Court, speaking by Mr. Justice Swayne, said:

"It is well settled that the only fraud permissible to be proved at law in these cases is fraud touching the execution of the instrument, such as misreading, the surreptitious substitution of one paper for another, or obtaining by some other trick or device an instrument which the party did not intend

to give. * * * The remedy is by a direct proceeding to avoid the instrument."

In *Union Pac. Ry. v. Harris* the question arose in connection with a lengthy and somewhat complicated charge to the jury. A clear distinction appears to have been made between the effect of misrepresenting what the release there in question was to embrace and misrepresentation of facts to procure the release as made. The contention of the plaintiff in that case was that the release was signed by him when ill and when he did not comprehend what he was doing, and that he was led to believe that he was signing a release of claims growing out of his illness only, such as outlays for doctors' services, and the like, and loss of time for two weeks. The contention of the defendant was that the release was intended to include a settlement of all matters of difference between plaintiff and defendant, including the liability of the defendant for the injuries received by plaintiff. The issue related exclusively to what was the subject-matter of the release. The Supreme Court did not discuss the question but was satisfied to say that the charge on the whole was correct. *Texas & Pac. Ry. Co. v. Dashiell* also dealt exclusively with what was the subject-matter of the release, and incidentally is important for elucidating the real issue in *Union Pac. Ry. v. Harris*.

Concerning the latter case the following observation is made:

"Several defenses were made to the release, among others, that the minds of the parties never met on the principal subject embraced in the release, namely, the damages for which the action was brought. This defense was complicated in the instructions of the court with the defenses of fraud and mental incompetency to understand the terms and extent of the release, and it is difficult to make satisfactory extracts from the charge of the trial court. Enough, however, appears to show that the court submitted to the jury the fact of mistake of injuries received, as bearing on the effect of the release, and this action was affirmed by this court."

In view of the issues in the last two cases they do not declare, as claimed by plaintiff's counsel, any different rule than that declared in the *Hartshorn* and *George* Cases. The releases there in question did not embrace the injury sued for by the respective plaintiffs, and the replications to that effect were in the nature of pleas of non est factum. The conclusion from all the cases in the Supreme Court is that the only fraud which may be availed of in an action at law to avoid a formally executed release of the claim sued on is misrepresentation, deceit, or trickery practiced to induce the execution of a release which the signer never intended to execute, and upon which the minds of the contracting parties never met, and does not include any of those misrepresentations of fact which may be resorted to in order to persuade the claimant to agree to the release as actually made.

That the old rule of the Supreme Court still prevails is affirmed generally by the national courts. In *Hill v. N. Pacific Ry. Co.*, 51 C. C. A. 544, 113 Fed. 914, the Circuit Court of Appeals for the Ninth Circuit recognized and enforced it. In like manner also the Circuit Courts have recognized and followed it. *Shampeau v. Connecticut River Lumber Co.* (C. C.) 42 Fed. 760; *Vandervelden v. C. & N. W. Ry. Co.* (C. C.) 61 Fed. 54; *Kosztelnik v. Bethlehem Iron Co.* (C. C.)

91 Fed. 606; *Hill v. N. Pacific Ry. Co.* (C. C.) 104 Fed. 754; *Such v. Bank of the State of New York* (C. C.) 127 Fed. 450; *Stephenson v. Supreme Council* (C. C.) 130 Fed. 491; *Heck v. Missouri Pac. Ry. Co.* (C. C.) 147 Fed. 775.

The Circuit Court of Appeals for the Sixth circuit, as evidenced by the cases of *Lumley v. Railway Co.*, 22 C. C. A. 60, 76 Fed. 66, and *Wagner v. National Life Ins. Co.*, 33 C. C. A. 121, 90 Fed. 395, differs from those just referred to. But in view of what we believe to be the doctrine of the Supreme Court as declared and followed in the cases *supra*, we are unable to adopt the conclusion reached by the learned and distinguished judges of that circuit.

Distinction is made by some courts between cases involving an informal receipt as distinguished from a formal release like *Such v. Bank of the State of New York*, *supra*, and between releases under seals and those not under seal. While there may be some ground for a distinction between cases involving a mere receipt, with no formal release, the consideration of which may always be inquired into and explained and cases involving formal deeds of release, as to which we express no opinion, we are unable to perceive any difference in principle between a formal release under seal and one not under seal. They may both alike be reformed, enforced or rescinded in equity. Certainly we cannot in this case give any consideration to the difference if there be such. The present release was not under seal, but was made in Missouri, and is subject to the law of Missouri. By that law the use of private seals in written contracts or other instruments theretofore required to be under seal is abolished, and a seal, if used, does not affect the force, validity, or character of the instrument or in any way change its significance or construction. Rev. St. Mo. 1899, § 893 [Ann. St. 1906, p. 829].

Inspired doubtless by the varying and conflicting opinions of different judges of the Supreme Court of Missouri on the question now under consideration, as illustrated by *Girard v. St. Louis Car Wheel Co.*, 123 Mo. 358, 27 S. W. 648, 25 L. R. A. 514, 45 Am. St. Rep. 556, and *Och v. M., K. & T. Ry. Co.*, 130 Mo. 27, 31 S. W. 962, 36 L. R. A. 442, the Legislature of Missouri in 1899 enacted the following law:

"Whenever a release, composition, settlement or other discharge of the cause of action sued on shall be set up or pleaded in the answer in bar to plaintiff's cause of action sued on, it shall be permissible in the reply to allege any facts showing or tending to show that said release, composition, settlement or other discharge was fraudulently or wrongfully procured from plaintiff, and the issue or issues thus raised shall be submitted with all the other issues in the case to the jury, and a general verdict or finding upon all the issues, including the issue or issues of fraud so raised, shall be sufficient." Rev. St. Mo. 1899, § 654 [Ann. St. 1906, p. 670].

This section is relied on by plaintiff's counsel in support of his contention that fraud, deceit, and misrepresentation practiced to secure the release in question may be shown in this action at law to avoid it. This statute, however, does not aid him. The rescission of the deed of release sought to be accomplished in this case is essentially and traditionally an equitable remedy. It is peculiarly appropriate for the consideration of a chancellor and not of a jury. It depends in many cases upon the exercise of a wise discretion in the light of countervailing

equities; is frequently awarded on conditions imposed in the final decree, and only when the remedy is invoked without unreasonable delay. The proof justifying it must be clear, convincing, and unequivocal. In view of these rules governing the administration of an equitable remedy, it is apparent that an action at law which is governed by more inflexible rules is not well adapted to administer that remedy. So manifest is this that rescission of contracts for fraud has, time out of mind, been a well-recognized subject of equitable cognizance.

Whatever may be the practice in code states, where the ancient distinction between legal and equitable remedies has been abolished, and where but one form of action is recognized, the rule subsists in the national courts that the distinction between legal and equitable defenses is always recognized. "They cannot be mixed. Equitable suits must be on the equity side of the docket, and actions at law on the law side. * * * Whatever the practice may be in state courts, in many of which the code practice obtains, the distinction between actions at law and suits in equity, together with legal and equitable defenses being abolished, the same court administering both law and equity, such practice does not obtain in the courts of the United States." *Levi v. Mathews*, 145 Fed. 152, 154, 76 C. C. A. 122, 124. "Although the forms of proceedings and practice in the state courts have been adopted in the District Court, yet the adoption of the state practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit." *Bennett v. Butterworth*, 11 How. 669, 674, 13 L. Ed. 859. "The remedies in the courts of the United States are at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles; and, although the forms of proceedings and practice in the state courts shall have been adopted in the Circuit Courts of the United States, yet the adoption of the state practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit." *Lindsay v. Shreveport Bank*, 156 U. S. 485, 493, 15 Sup. Ct. 472, 475, 39 L. Ed. 505, and cases cited. To the same effect see, also, *Hill v. Northern Pac. Ry. Co.*, *supra*, and cases cited.

We recognize that state statutes frequently create new and enlarge old equitable rights, and that substantive rights of that kind are enforced in the national courts, but we perceive nothing in the Missouri statute in question of that character. It does nothing but change the forum of an equitable action from a court of equity, where it naturally belongs, to a court of law, where it does not naturally belong. While the state may do this with respect to its own courts, it clearly has no power to legislate away the equitable jurisdiction of the national courts.

The case of *Cowley v. Northern Pac. R. R. Co.*, 159 U. S. 569, 16 Sup. Ct. 127, 40 L. Ed. 263, relied on by plaintiff's counsel, does not support his contention. The case concerns the rights of parties in the Circuit Court on removal of a suit from the state court. It declares the obligation of the national courts to recognize and enforce new rights created by state statute, but lest it should be distorted into

authority for plaintiff's present contention the court apparently in a precautionary way observes:

"While the federal court may be compelled to deal with the case according to the forms and modes of proceeding of a court of equity, it remains in substance a proceeding under the statute, with the original rights of the parties unchanged."

To avoid the effect of the rule of the Supreme Court on the subject in question, learned counsel for plaintiff in his brief undertakes to assimilate the replication in this case to that in the Harris Case. He argues that this replication tenders the issue that there was no meeting of minds of the contracting parties, and that trickery was practiced in securing the execution of the release as distinguished from that practiced to induce the agreement for the release. We think he is mistaken about this. The replication, so far as it is necessary to quote it for our present purposes, is as follows:

"That immediately after the death of her said husband [which occurred January 27, 1905] one Polk, the general agent of the said defendant company, * * * came to her house, and then and there stated that the defendant was not liable on the policy, and then and there informed her that her husband had died of disease, whereby the company was not liable. That afterwards, on March 2d, 1905, or thereabouts, at the request of said Polk, she went to the office of said Polk and the office of said company in the city of St. Louis, and said Polk and the attorney of said defendant, one Sample, from Chicago, again informed her that the company would not pay said policy and was not liable thereon, because her said husband had died of disease and not accident, all of which was false; and then and there said Polk and said Sample informed plaintiff that they had in their possession certain affidavits, made by physicians, to the effect that her husband had died from disease or had been murdered, and that the coroner had rendered a verdict that her said husband had died of disease; and said Polk and said Sample then and there read to plaintiff what purported to be affidavits of certain persons, and what purported to be a verdict of the coroner of the said city of St. Louis, to the effect that her said husband had either died from disease or had been slugged, from the effect of which injury he had died, all of which was false and known by said Polk and said Sample to be false; and said Polk and said Sample, acting respectively as general agent and attorney for said defendant company, then and there offered to give plaintiff \$300 as a gift. Plaintiff states that at the time she being sick and infirm and partially blind and not able to read and being distressed in mind on the account of the death of her said husband, and believing the statements of said Polk and said Sample, accepted said sum of \$300, which purported to be a gift; but plaintiff has no knowledge or recollection of ever having signed a release of said policy as set forth in said answer. And plaintiff states that because of the said misrepresentations and false statements of said defendant by its agents taking advantage of her condition of mind and body, as aforesaid, the said release which is set up in defendant's said answer, if any was ever given, was obtained by fraud, deceit, and misrepresentation, and was without consideration, and is void and of no effect."

Scrutiny of the replication discloses that the defendant represented to plaintiff that she had no cause of action and gave reasons for it, but offered, in order to get a release of any possible claim, a gift or consideration of \$300. The only statements of defendant's agents which are complained of are those to the effect that they had information which justified them in believing that plaintiff had no meritorious cause of action against defendant. She says she believed those statements, and accepted \$300, "which purported to be a gift." Naturally enough it purported to be a gift and was a gift, if what the agent said

was true, namely, that the plaintiff had no cause of action. It will be noticed that plaintiff nowhere in the replication said that when she signed the release in question she believed she was signing a receipt for a gift. No allegations of the replication can be fairly construed into tendering an issue that the minds of the parties did not meet on the terms of the release as executed. The replication is a curious pleading. It does not confess the signing of the release, and avoid it on the ground that the minds of the parties had not met, or that it was falsely represented to her to be a receipt for a gift; but it is in effect a denial by plaintiff that she ever executed a release, and a hypothetical plea that if she did it was obtained by fraud, deceit, and misrepresentation. The bare fact, if it be a fact, that plaintiff was blind and not able to read, affords her no legal protection. As said by this court in Chicago, St. P., M. & O. R. Co. v. Belliwith, 28 C. C. A. 358, 83 Fed. 437:

"A written contract is the highest evidence of the terms of an agreement between the parties to it, and it is the duty of every contracting party to learn and know its contents before he signs and delivers it. * * * If one can read his contract, his failure to do so is such gross negligence that it will estop him from denying it, unless he has been dissuaded from reading it by some trick or artifice practiced by the opposite party. If he cannot read it, it is as much his duty to procure some reliable person to read and explain it to him, before he signs it, as it would be to read it before he signed it, if he were able to do so, and his failure to obtain a reading and explanation of it is such gross negligence as will estop him from avoiding it on the ground that he was ignorant of its contents."

The replication, in our opinion, discloses no advantage taken of the plaintiff by the defendant's agents to induce her to sign the paper. If it shows anything, it shows that the release was obtained by fraud, deceit, and misrepresentation, which might, if proved, afford ground for rescission of the contract in equity.

The conclusion already foreshadowed is that the Circuit Court erred in not directing a verdict for defendant. This conclusion renders unnecessary any consideration of the many other questions presented in the case. Until the release is set aside, it constitutes an effectual bar to any action on the policy, and unless it shall be set aside, the other questions are moot questions only. The judgment is reversed, and the cause remanded, with directions to grant a new trial.

(157 Fed. 161.)

NELSON et al. v. BANK OF FERGUS COUNTY.

(Circuit Court of Appeals, Eighth Circuit. November 25, 1907.)

No. 2,587.

1. CORPORATIONS—FOREIGN CORPORATIONS—LIABILITY OF DIRECTORS UNDER MONTANA STATUTE.

CIV. Code Mont. § 451, as amended by Act Feb. 26, 1903 (Laws 1903, p. 45, c. 32) providing that "every corporation having a capital stock" shall annually, and within 20 days from and after the 31st day of December, make a report, which shall state the amount of its authorized capital, and what portion has been paid, and the amount of its debts, and that, if any such corporation shall fail to make such report, its directors

shall be jointly and severally liable for all debts of the corporation then existing or which may be thereafter contracted until such report shall be made and filed, being general in its language and having been changed into its present form after the adoption of the state Constitution, article 15, § 11, of which provides that no foreign corporation "shall have or be allowed to exercise or enjoy within this state any greater rights or privileges" than those possessed or enjoyed by domestic corporations, applies alike to domestic and foreign corporations doing business within the state, and the failure of such a foreign corporation to make the required report renders its directors liable for the existing debts of the corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 2529, 2530.]

2. CONSTITUTIONAL LAW—RETROSPECTIVE LAWS—AMENDMENT OF STATUTE.

The amendment of such section of the statute by Act Feb. 26, 1903 (Laws 1903, p. 45, c. 32), which merely changed the time when the report is required to be filed, does not render it a retrospective law, within the prohibition of Const. Mont. art. 15, § 13, as applied to debts of a corporation contracted before its enactment.

3. APPEAL AND ERROR—REVIEW—EXCESSIVE JUDGMENT.

That a judgment is excessive cannot be assigned for error in the Circuit Court of Appeals.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3944-3947.]

In Error to the Circuit Court of the United States for the District of Minnesota.

Newel H. Clapp (George M. Nelson and Charles W. Farnham, on the brief), for plaintiffs in error.

Edward P. Sanborn and S. H. McIntire, for defendant in error.

Before VAN DEVANTER and ADAMS, Circuit Judges, and RINER, District Judge.

ADAMS, Circuit Judge. Since June, 1902, the New Year Gold Mines Company, a corporation of West Virginia, has had its principal office and has conducted its operations consisting of mining in Fergus county, Mont. On December 31, 1902, it owed the defendant in error, the Bank of Fergus County, and another corporation which assigned its claim to the bank, some \$12,000. The Mines Company failed to file, within 20 days after December 31, 1903, in the office of the clerk of Fergus county, a report, signed by its president and majority of its directors, stating the amount of its capital stock, the proportion thereof paid in, and the amount of existing indebtedness, as required by section 451 of the Civil Code of Montana, as amended by the act of February 26, 1903 (Laws 1903, p. 45, c. 32); and this suit was brought against the directors to enforce liability for the debts of the corporation created by such failure. The Circuit Court held them liable and this writ of error challenges that judgment.

The section in question reads in part as follows:

"Every corporation having a capital stock, shall annually and within twenty days from and after the thirty-first day of December, make a report which shall state" etc. "If any such corporation shall fail so to do, all the directors of the corporation shall be jointly and severally liable for all debts of the corporation then existing or which may be thereafter contracted until such report shall be made and filed. * * *"

Defendants' counsel contend that the statute does not mean what its introductory words, "Every corporation having a capital stock shall," etc., apparently indicate, but that it relates to domestic corporations only, and not at all to foreign corporations, like the Mines Company. In maintaining this contention the history of the statute is appealed to. Section 15, tit. 1, p. 28, of the Territorial Laws of Montana for the year 1867, under the title "An act to provide for the formation of corporations for certain purposes" is as follows:

"Every such company shall annually within twenty days from the 1st of September make report which * * * shall state, * * * and if any of said companies shall fail to do so all the trustees of the company shall be jointly and severally liable for all debts of the company then existing and for all that shall be contracted before such report shall be made."

This section, which is the origin of the one invoked by the plaintiff in this case, clearly relates to domestic corporations, and subjects directors of such corporations only to liability for its debts. This section 15 was carried forward into the Codified Statutes of Montana (1871-72) as section 15, c. 18, p. 409, which relates mainly to domestic corporations. Section 46 (page 419) however, of that chapter, relates to foreign corporations and requires that they, as a condition of doing business in Montana, shall file for record with the Secretary of the Territory and in the office of the recorder of the county in which they propose to do business a copy of the charter or certificate of incorporation duly verified as therein prescribed. Chapter 15, div. 5, of the Revised Statutes of 1879, entitled "Corporations for Industrial or Productive Purposes," contains sections 258 and 289, which are identical, respectively, with section 15 of the Laws of 1867 and section 46 of chapter 18 of the Codified Statutes of 1871-72.

Up to this time it will be seen that domestic and foreign corporations had been treated separately and quite differently in the statutes. The first had been required to file verified statements showing the amount of their authorized capital and what portion had been paid in and the amount of their debts. The second had been required to file only certified copies of their charters or certificates of incorporation. By an act approved July 22, 1879 (Laws 1879, [Ex. Sess.] p. 8), the Legislature of Montana for the first time enacted that foreign corporations should be required to file, among others, the statements before that time required of domestic corporations, with some additional information touching assets and liabilities. The penalty for failure to do so (instead of subjecting the directors to liability for the debts of the corporation) was to invalidate the contracts of the foreign corporations made during the continuance of such failure and subject the corporations themselves to fines. This last act was carried forward into the Compiled Statutes of 1888 as chapter 24, div. 5, which has for its title "Foreign Corporations." It deals exclusively with such corporations, making no change in the penalty theretofore prescribed for failure to make the required statements. Chapter 25 of the compilation of 1888 has for its title "Corporations for Industrial or Productive Purposes," and first deals with the method of organizing corporations in the state of Montana—that is, with the organization of domestic corporations; and then in section 460 is found a reproduction of section

15 of chapter 18 of the Codified Statutes of 1871-72 with its peculiar penalty for noncompliance with its provisions. So that in the compilation of 1888 domestic and foreign corporations are the subjects of different sections, and both are required to file certain statements (one a statement of capital stock authorized and paid in, and its debts; the other, the statement just mentioned, together with additional showing of the amount of assets and some other details not required of domestic corporations), and they are subject to different penalties for failure to file the statements.

It may be conceded that section 460 of chapter 25, which contains the only provision subjecting corporate directors to liability for corporate debts for failure to make required statements, has relation only to domestic corporations. Its introductory words, "Every such company," are clearly referable to the kind of corporation provided for in antecedent sections, and they were domestic corporations.

In 1889 the state of Montana adopted its Constitution and ordained (article 15, § 11):

"That no company or corporation formed under the laws of any other country, state or territory shall have or be allowed to exercise or enjoy within this state any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of the state."

In February, 1895, code commissioners appointed by a previous Legislature submitted to the Legislature then in session their report recommending the adoption of four codes, the Political Code, the Civil Code, the Code of Civil Procedure, and the Penal Code. These were adopted in the form known as "Montana Statutes and Codes" (1895). Section 299 of the Civil Code so adopted is in the following language:

"Every corporation shall semiannually within twenty days from the first days of January and July make report, which shall * * * state the amount of the capital and of the proportion actually paid in, and the amount of the existing debts, * * * and if said corporation shall fail to do so, all the directors of the corporation shall be jointly and severally liable for all debts of the corporation then existing, and for all that shall be contracted before such report shall be made."

The foregoing was reported and adopted as part of the Civil Code. Afterwards, by an act approved March 14, 1895, the Legislature amended section 299 of the Civil Code so as to make the same read as follows:

"Every corporation having a capital stock shall annually * * * [instead of "Every corporation shall semiannually," as before] make a report," etc.

This section as amended finally went into the Civil Code of 1895 as section 451, under the general title, "General Provisions Applicable to all Corporations," but under a subtitle, "Corporations Defined and How Organized."

Section 1030 of the Civil Code, under the title of "Foreign Corporations," is practically a reproduction of the original act of July 22, 1879, and re-enacts its conditions requiring statements, etc., upon which foreign corporations may do business in the state, but does not subject

their directors to liability for their debts for failure to make the statements.

The act of February 26, 1903 (Laws Mont. 1903, p. 45, c. 32), which is the last expression of the Legislature on the subject, amends section 451 of the Civil Code so as to change the time within which reports should be filed from "within twenty days from and after the first day of September" annually to "within twenty days from and after the thirty-first day of December" annually.

It is in view of this legislative history that defendants' counsel contend that the liability of corporate directors for the debts of their corporations for failure to file required statements is limited to domestic corporations only. Is this sound? We think not, and for the following reasons:

1. The language of the statute as it now stands is broad enough, when literally read, to subject the defendants who were directors of the Mines Company to liability for plaintiff's debt. It reads, "Every corporation having a capital stock shall annually within twenty days from and after the thirty-first day of December make a report," etc., and in case of failure to do so it subjects its directors whose duty it was to sign the report to liability for all its debts. The Mines Company was a corporation having a capital stock and in other respects comes within the contemplation of the statute. Presumptively, therefore, the defendants are liable for the debt sued for in this action. The language of the law, being clear and unambiguous, leaves little, if any, scope for judicial construction. *United States v. Wiltberger*, 5 Wheat. 76, 96, 5 L. Ed. 37; *Brun v. Mann*, 80 C. C. A. 513, 151 Fed. 145, 157.

2. In view of the constitutional prohibition (first effective in 1889) against allowing a foreign corporation to exercise or enjoy any greater rights or privileges than those possessed by domestic corporations, it was a reasonable and appropriate thing for the Legislature to change the old law, which subjected directors of domestic corporations only to liability for their debts, so as to subject directors of both domestic and foreign corporations alike to that liability, and thereby to harmonize the statute with the Constitution. *Grenada County Supervisors v. Brogden*, 112 U. S. 261, 269, 5 Sup. Ct. 125, 28 L. Ed. 704; *Williams v. Gaylord*, 42 C. C. A. 401, 102 Fed. 372, 375. That prohibition certainly indicated to the Legislature a general organic policy which reasonably actuated it to subject directors of domestic and foreign corporations alike to liability for the debts of their respective corporations.

It is argued against this that the prohibition is against foreign corporations only, and cannot be invoked to affect individual director's responsibility for the indirect consequences of violating law by their corporations. This may, as broadly stated, be true. Nevertheless it is a discrimination in favor of one class of corporations to enable it to secure and have directors who shall not be subject to personal liability, while another class is not permitted to enjoy that advantage. The former could doubtless more readily secure directors and officers than the latter. The case of *Crisswell v. Montana Cent. Ry. Co.*, 18 Mont. 167, 44 Pac. 525, 33 L. R. A. 554, invoked by defendants' counsel deals with the question whether a given statute is in conflict with

the provisions of article 15, § 11, of the Constitution, and is of little value on the present inquiry concerning the legislative intent in enacting the Code of 1895, in the light of the then existing constitutional provision.

3. There are many evidences of an intelligent and determined purpose on the part of the Legislature, in 1895, to change the law on the subject in question from what it had been before. Up to that time all the legislation imposing personal liability on directors had been limited to directors of domestic corporations, and all the statutes on the subject, from and including the initial act of 1867, had begun with the words, "Every such company shall * * * make report," etc., and those words clearly referred to antecedent sections of the law concerning domestic corporations only. In 1895 a noticeable change in phraseology took place. The codifying commissioners first made their report, recommending, among other things, the Legislature to omit the word "such," and to require two annual reports by corporations, instead of one as before. Their report was adopted as a whole, and section 299, which related to the subject in question, was according to its terms broad enough to embrace all corporations, instead of domestic corporations as before. But this is not all. The attention of the Legislature was again called to the subject, and at the same session (1895) it amended section 299 of the Civil Code by limiting its operation to corporations "having a capital stock" and limiting the reports to be filed to one annual report, instead of two semiannual reports, as before. The act as so amended went into the Statutes and Codes of 1895 as section 451 of the Civil Code. Later, on February 26, 1903, the Legislature again took up section 451 and by an amendment of that date changed the time for making corporate reports from "within twenty days after the first day of September" to "within twenty days after the thirty-first day of December" of each year. The Legislature apparently discovered no doubtful or ambiguous phraseology which it desired to correct.

The result of these modifications of the old law was to make the provision in question embrace, according to its terms, all corporations which had capital stock, as distinguished, probably, from religious, social, and benevolent corporations, which had no capital stock, and to require them to make one annual report, instead of two, as recommended by the commissioners. It thus appears that the legislative mind had been sharply called to the subject in question on three different occasions, and that it finally left section 451 so as to clearly and unequivocally embrace foreign corporations as well as domestic. In such circumstances it would be unreasonable to conclude that the language finally adopted was the result of inadvertence and did not accurately express the legislative purpose. The Legislature must be presumed to have had some purpose in deliberately changing the phraseology of the old law, and persistently adhering to the change, when subsequent amendments called critical attention to it.

But it is said that section 451 of the Civil Code is found under a sub-head "Corporations Defined and How Organized," denoting domestic corporations, and not under the title "Foreign Corporations," un-

der which is found many, and presumptively, as it is claimed, all, the provisions concerning them, and that all its associated sections concern domestic corporations only. An argument is deduced from this fact in favor of the defendants' contention. Whatever aid the special location of this section in the statutes might otherwise give us, we are precluded by the Legislature itself from drawing any presumptions therefrom. Section 5182, subd. 3, of the Political Code, which forms a part of the "Statutes and Codes" in question provides as follows:

"The arrangement and classification of the several parts of said Codes have been made for the purpose of convenience and orderly arrangement and therefore no implication or presumption of a legislative construction is to be drawn therefrom."

This section amounts to a legislative declaration against indulging in the presumption invoked by defendants' counsel.

It is also argued, in view of other provisions of the statute in question, that the Legislature intended to restrict the words "Every corporation having a capital stock" to domestic corporations having a capital stock. To this argument we have given careful consideration; but, for reasons already pointed out, we do not think it correctly interprets the legislative will.

The contention that the judgment below was excessive cannot be considered by us. No error of this kind was assigned, and, if it had been, under firmly settled authority we could not consider it. *Illinois Cent. R. Co. v. Davies*, 76 C. C. A. 613, 146 Fed. 247.

Contention appears to be made in the brief of defendants' counsel that the amendatory act of 1903, under the provisions of section 13 of article 15 of the Constitution of Montana, which prohibits retrospective laws, is inapplicable to the present case, because the debts sued for were contracted by the Mines Company before it was enacted. This contention, as we remember it, was abandoned at the oral argument. If not, it is untenable. *Diamond Glue Co. v. United States Glue Co.*, 187 U. S. 611, 614, 23 Sup. Ct. 206, 47 L. Ed. 328. The amendment in question is a constitutional and appropriate exercise of the sovereign power of the state over corporations, whether domestic or foreign, in the nature of a regulation to secure safety to its citizens and conformity to its internal policy. *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552; *New York Life Ins. Co. v. Cravens*, 178 U. S. 389, 20 Sup. Ct. 962, 44 L. Ed. 1116; *Pinney v. Nelson*, 183 U. S. 144, 22 Sup. Ct. 52, 46 L. Ed. 125. Moreover, the Mines Company was subjected to no new duty or burden by the amendment of 1903. The obligation to make reports had been upon all foreign corporations for many years before the debts in question were created. The only change made by the amendment was in respect of the time when reports should be made. Other than in that incidental feature the old law continued in force, and governed the conduct of all foreign corporations as well after the amendment as before. So far as the new law was a re-enactment of the old one, it was an affirmation and continuation of the old law and not new legislation.

Great Northern Ry. Co. v. United States, 84 C. C. A. 93, 155 Fed. 945.

The judgment of the Circuit Court must be affirmed, and it is so ordered.

(157 Fed. 168.)

UNION PAC. R. CO. et al. v. ROSEWATER.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1907.)

No. 2,468.

1. RAILROADS—INJURY OF PERSON AT CROSSING—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where plaintiff, who was driving upon a city street in the evening, on approaching a railroad crossing having four tracks, stopped on signal of the flagman before reaching the first track, and waited until some engines had passed, and then in obedience to a signal of the flagman started on after first looking and listening, and was struck by a train on the second track, the question whether or not he was guilty of contributory negligence in failing to continue to look and listen after starting across was not one of law but of fact, to be determined by the jury, in view of the circumstances of the particular case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1187.]

2. SAME—DUTY TO LOOK AND LISTEN—SIGNAL FROM FLAGMAN.

The placing of gates or the stationing of flagmen at railroad crossings in a city are not duties imposed by statute or municipal ordinance on railroad companies, or voluntarily assumed by them, for the purpose of relieving the traveler on the street from taking those precautions for his own safety required by the long-settled rule of law, but as additional precautions to meet the increased peril resulting from local conditions in cities; and open gates, or a signal from a flagman to cross, do not relieve a traveler from the duty to look and listen before entering upon the tracks.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1072.]

In Error to the Circuit Court of the United States for the District of Nebraska.

Edson Rich and William Baird (W. S. Kenyon, on the brief), for plaintiffs in error.

W. J. Connell (Simeon Bloom, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. Charles Rosewater sued the Union Pacific and the Illinois Central railroad companies for personal injuries sustained in a collision at a crossing. He recovered a judgment against them jointly, and they now seek its reversal. The facts developed at the trial are as follows: The plaintiff, a physician, was driving in his phaeton northward on Thirteenth street in Omaha, Neb., about 8 o'clock of a January evening. The street is one of the important, much traveled thoroughfares of the city. As he was approaching the intersecting tracks of the Union Pacific, upon one or more of which the Illinois Central had the right to operate its trains, he was signaled to stop by a flagman who was in the service of both companies. The signal was given by lantern, and the plaintiff stopped with his horse's head three or four feet south of the south track. There were four of

these tracks, and, for convenience, they will be referred to numerically beginning with the one nearest the plaintiff. They crossed the street at somewhat of an angle—not squarely—and as they proceeded westward they curved towards the south, out of sight. The plaintiff's view to his left or westward was obstructed to some considerable extent by a stone wall built along the side of the street to support a viaduct which crossed overhead behind him. The north end of the wall was about 10 feet from the south track, at which point the wall was 6.2 feet high. As it receded southward along the street side, the wall rose in height until it attained its maximum for the support of the overhead viaduct structure. From the end near the south track the wall curved westward at substantially the same height, and served to retain a fill upon which was laid the track that crossed on the viaduct. There was a similar obstruction on the east side of the street to the right of the plaintiff as he sat in his phaeton, but we are not specially concerned with it. The flagman gave plaintiff the stop signal from his customary stand on the north side of the tracks. Immediately after the plaintiff stopped, two Union Pacific engines, coupled together, went westward over the crossing upon the third track. After they passed, the flagman both signaled with his lantern and verbally directed plaintiff to cross. As to this there was a conflict in the evidence, but as that was the issue which the trial court submitted to the jury we take the verdict as settling the fact here. In obedience to the flagman's direction the plaintiff applied the whip to his horse, and drove over the first track and upon the second, where he was struck by an Illinois Central train coming from the west at a speed variously estimated by witnesses at from 15 to 35 miles per hour. The injuries complained of were caused by this collision. The headlight of the locomotive was burning. The flagman knew the train was coming. There was testimony that considerable steam and smoke from the Union Pacific engines were driven by the wind towards the plaintiff, but whether they were sufficient to obscure his vision as he started to cross remains an unsettled question. The issues of fact were so narrowed by the trial court that the verdict does not answer it. A civil engineer testified, and his testimony was not denied, that a man standing about five feet south of the first track where the plaintiff's horse stood could see westward upon the second track, over which the Illinois Central train came, a distance of 375 feet. But the plaintiff, as he sat in his vehicle, was 6 or 7 feet further away, and no measurements were taken from his position. If the plaintiff had driven forward to place himself at the point from which the measurements were taken, his horse would have been upon the first track. The first and second tracks were a little more than 10 feet apart. The plaintiff testified that, upon receiving the direction of the flagman, he first looked to the left and to the right, and perceiving no train approaching he drove forward. He also said that, after starting forward, he did not again look along the tracks, but "relied on the order of the flagman, together with the invisibleness of any danger."

These are the substantial facts, and on them the defendants moved the trial court for a directed verdict (1) because no negligence on their part was disclosed—that is to say, no negligence of their flagman; and (2) because contributory negligence of the plaintiff was shown.

The first of these assertions, obviously untenable, need not be further mentioned. As to the second: Assuming for the moment that the maintenance of a flagman at the crossing, and his signal to the plaintiff to cross the tracks, did not relieve the latter from the duty to take those precautions for his safety which the law imposes in cases where no flagmen are present, can it be said the evidence that he failed in his duty was so conclusive as to justify a court in holding that he negligently contributed to his own injury? We think not. It is a settled rule of law that the traveler upon a highway must look and listen before venturing upon the track, and that he must, if possible, perform that duty at some point in his approach where performance will be serviceable. It is conceded that the plaintiff stopped close to the track, and he testified that after receiving the flagman's direction, and before venturing further, he looked for coming trains, but saw nothing. It is true that after driving on the track he did not again look to the right and left, but we cannot say that it was his duty to do so. The rule of law does not go so far. When a traveler upon a highway is approaching a railroad crossing—a place of danger—it is altogether reasonable that he should use his senses to discover whether it is safe to go upon it, and also to stop before doing so if the physical surroundings make that further precaution necessary. He is then in safety and entirely master of his movements, and, as all reasonable minds agree that such measure of care should be taken for the preservation of life and limb, the law has prescribed its exercise as an imperative duty. But when the traveler has performed his full duty in that respect, and has driven upon the crossing at the invitation of a flagman stationed there by the railroad company to assist in the prevention of accidents, whether, in addition to his attention to the guidance of his vehicle, he should continue to look to the right and to the left is a more doubtful proposition. He is then in a position of possible peril, and, in view of the various emergencies likely to arise, just what particular precaution he should take is not so clear and plain as to justify its prescription as a definite, fixed rule of conduct. Were it otherwise, the doing of the very thing prescribed might lead to disaster. The measure of care and caution to be observed in such cases should be more adjustable to the particular conditions and emergencies, and is that active watchfulness which ordinarily prudent men would adopt under like circumstances; and the question whether the traveler fell short is one for the jury. In the very case before us, had the plaintiff looked while his horse was upon the first track and seen the headlight of the rapidly approaching train, it is doubtful that in the darkness he could have told upon which of the tracks, running closely parallel, it was coming; and in case of uncertainty his natural impulse would have been to hasten forward rather than to turn backward. It is not at all clear that the precautions which counsel claim to be imperative would have been effectual to prevent the collision. The plaintiff was not a pedestrian, having quick control of his own movements, whose vigilant use of the senses affords almost a complete assurance of his personal safety; but he was incumbered with a horse and vehicle, more unwieldy in management, and which to some extent naturally required attention. This distinction is recog-

nized in *Blount v. Railway*, 9 C. C. A. 526, 61 Fed. 375, in which it was held that a pedestrian who accepted the invitation of open gates was nevertheless guilty of contributory negligence in failing to look and listen.

But it is said that the physical facts show that the plaintiff could have seen had he looked before venturing upon the crossing unless the presence of steam and smoke temporarily obscured his vision, and that in the latter case it was his duty to wait until they passed away. Clear physical facts prevail over the testimony of a witness and over the presumption that one injured or killed took care for his safety (*Tomlinson v. Railway*, 67 C. C. A. 218, 134 Fed. 233) and if plaintiff could have seen it must be assumed that he did not look or that looking he tried to cross ahead of the train. But the state of the evidence does not warrant us in saying either that his vision was temporarily obscured by steam and smoke or that under most favorable conditions he could have seen the headlight from where he sat in his vehicle. Counsel for defendants attempt a demonstration that he could have seen had he looked, but in doing so they speculate as to the speed of the horse, make estimates of the time that elapsed before the collision and finally split a second into halves. The premises are too debatable to warrant such a conclusion by a court whose sole province in a case like this is the correction of errors of law. The defendants were not entitled to a directed verdict.

The trial court, however, did not submit to the jury the questions whether plaintiff looked before driving on the crossing, and whether he could have seen had he looked. The defendants requested instructions specifically defining the plaintiff's duties as in ordinary cases, but the court declined to give them. On the contrary, it instructed the jury that, if the flagman signaled the plaintiff to cross, the latter had a right to presume that it was safe for him to do so, "unless he knew the danger of doing so, and that the danger was so obvious and threatening that no man of ordinary care and prudence would have assumed the risk." Out of the giving and refusal of the instructions mentioned arises the serious question in the case.

Does the signal of a flagman at a railroad crossing of a city street relieve the traveler on the highway of the duty to look and listen before venturing upon the tracks? The additional precautions to prevent accidents, such as gates and flagmen, with their means of giving warning, are adopted in view of the greatly increased dangers at such crossings. The noise of city traffic, the number of pedestrians and vehicles upon the street, the haste and activity of urban life, the frequency of the passing of engines and trains, and the proximity of buildings and other structures to the tracks make such precautions necessary. They are designed to meet the increase of peril resulting from local conditions and the congestion of traffic. Such additional precautions are not imposed by statute or municipal ordinance upon railroad companies, or voluntarily assumed by them for the purpose of relieving the traveler upon the street from the taking of those simple precautions for his own safety which the long-settled rule of law requires of him. To hold otherwise would tend to defeat the very purpose for which gates and flagmen are maintained. It would result not so much in lessening

danger and ensuring safety as in the mere transference of a mutual obligation to exercise care entirely to the shoulders of one of the parties. The courts are divided upon the question, some holding the traveler must still look and listen (*Greenwood v. Railroad*, 124 Pa. 572, 17 Atl. 188, 3 L. R. A. 44, 10 Am. St. Rep. 614; *Railway v. Frantz*, 127 Pa. 297, 18 Atl. 22, 4 L. R. A. 389; *Berry v. Railroad*, 48 N. J. Law, 141, 4 Atl. 303; *Ellis v. Railroad*, 169 Mass. 600, 48 N. E. 839. See, also, *Merrigan v. Railroad*, 154 Mass. 189, 28 N. E. 149); others that he may rely wholly upon the invitation of the flagman or the open gate (*Railroad v. Webb*, 90 Ala. 185, 8 South. 518, 523, 11 L. R. A. 674; *Railroad v. Anderson*, 109 Ala. 299, 19 South. 516; *Railroad v. Clough*, 134 Ill. 586, 25 N. E. 664). The case of *Railway v. Frantz*, *supra*, was one of open gates. The Supreme Court of Pennsylvania upheld an instruction of the trial court that "it was the duty of the plaintiff to use care in approaching the tracks, to stop, look, and listen for approaching cars. It was also his duty to keep such lookout as was reasonable while crossing the track and avoid a car if he could, even after he had started to cross; and it was his duty that the horses should be driven in a careful and cautious manner." The Supreme Court also said:

"There were a number of tracks, and the evidence is strong that the plaintiff stopped, looked, and listened before crossing the first. It might still have been his duty to stop again before going upon the track of the defendant company on which the collision took place, but the evidence does not enable us to say so as a matter of law. It is far from clear that the place where plaintiff stopped was not the best, or that there was any safe place for a second and better view. It was proper therefore that the case should be left to the jury, and the nonsuit was rightly refused."

In our opinion the rule stronger in reason and more consistent with wise policy is that we have indicated. Whether the plaintiff looked for approaching trains before venturing upon the tracks, and whether, looking, he could have seen, were matters material to the defense, and the jury should have been so instructed. The trial court in effect held them unimportant when it instructed the jury that plaintiff had a right to act upon the invitation of the flagman unless confronted by a known danger or one obvious and threatening. In other words, it was held that the plaintiff had no active duty for his own safety; that he could rely on the flagman unless the danger of doing so obtruded itself on his notice.

Counsel cite the decision of this court in *Eddy v. Powell*, 1 C. C. A. 448, 49 Fed. 816. In that case a freight train had been cut at a city crossing, leaving a space between the two sections through which vehicles and pedestrians could pass. The plaintiff drove up and stopped. There was evidence that he was then directed to cross by the conductor or brakeman of the train who was standing at or near the crossing, and whilst he was attempting to do so the engineer suddenly backed the front section to couple up the train, and the injury resulted. This court sustained instructions that, if the direction to cross was given the traveler, he had a right to rely on it unless he was aware of the danger, or some danger was so obvious as would have deterred a man of ordinary prudence from attempting to cross. The train was at

rest, and presumably the conductor or brakeman knew when a movement for coupling would be made. The plaintiff saw all there was to be seen, and the most vigilant use of his senses would not have helped him more. He was not required to alight and make inquiry of the engineer, nor, under the circumstances, was it his duty to wait an indefinite time for the train to be coupled up and to pass away. *Railway v. Ray*, 25 Tex. Civ. App. 567, 63 S. W. 912, and *Railway v. Keely*, 138 Ind. 600, 37 N. E. 406, are like *Eddy v. Powell*, in that foreknowledge of the movement of the engine or train could not be gained by the traveler by any measure of care that the law imposed on him. It is quite clear that these cases furnish no guide for the one before us.

The judgment is reversed and the cause remanded, with direction to grant a new trial.

SANBORN, Circuit Judge (concurring). I concur in the reversal of the judgment on the ground stated in the opinion of the court, and also because, in my view, the plaintiff was conclusively proved to have been guilty of contributory negligence. As I understand it, the evidence conclusively established these facts. The plaintiff stopped when he was from 10 to 25 feet south of the first track. His witness Kretek stood at the north end of the east abutment. He testified that the steam and smoke were insufficient to obscure their vision of the oncoming engines and train, and there is no substantial evidence to the contrary, and that he saw the engines coming from the west on the third track and the flagman on the north side of that track. Kretek and the plaintiff saw the two engines coming from the west on the third track before the flagman signaled them to stop. The Illinois Central train was coming from the east on the second track with the headlight of the engine burning. The two engines coming from the west on the third track passed between the flagman and the Illinois Central train, and necessarily obstructed his vision of it for a time, while the only obstruction to the plaintiff's view was the east abutment of the viaduct. From the point where he was sitting in his buggy he could not see easterly along the second track more than 80 feet, according to the most favorable testimony on his behalf, but at a point 5 feet south of the first track and 22 feet south of the second track he could see to the east along the latter track 375 feet. When he came out from behind the obstruction of the abutment to this point, the passenger engine with its blazing headlight was within 140 feet of the crossing, and he could not have failed to see it if he had looked, nor, if he had exercised reasonable prudence, to have appreciated and avoided danger from it, either by stopping his horse or by backing him to his former position. His horse was no nearer the second track when the coming train was visible to him than he was to the first track when he stopped him. The plaintiff, when he received the signal and direction of the flagman to cross, looked to the east, when he knew that a plain obstruction necessarily prevented his looking from being of any avail, but when he came from behind that obstruction to a point where looking would have been of use and where, if he had looked, he must have seen, he did not look, and his failure to look was one of the direct causes of his injury. The judge

who heard the witnesses and tried this case below was of the opinion that the evidence conclusively proved the contributory negligence of the plaintiff, unless it was justified by the signal and order of the flagman, and he so instructed the jury. As he was not justified by that signal and order in failing to continue to exercise ordinary care for his safety, and as ordinary care at a railroad crossing where the view is obstructed at one point and clear at another requires the traveler to look along the track as soon as he passes the obstruction, or as soon as it is removed, the plaintiff's failure to look after he could have seen and before he crossed was, in my opinion, contributory negligence fatal to his action.

One "does not relieve himself from the imputation of negligence by looking when he cannot see, and omitting to look again when he could see, and avoid danger." *Grand Trunk Ry. Co. v. Cobleigh*, 24 C. C. A. 342, 78 Fed. 784, 787; *Fletcher v. Fitchburg R. R. Co.*, 149 Mass. 127, 21 N. E. 302, 3 L. R. A. 743; *McCrary v. C., M. & St. P. Ry. Co.* (C. C.) 31 Fed. 531; *Abbett v. C., M. & St. P. Ry. Co.*, 30 Minn. 482, 16 N. W. 266, 267. "We cannot avoid the conclusion that the deceased did not look up or down the track as he should have done, after passing the wood office. If he had so looked, he certainly must have noticed the headlight of the approaching train. If he did not look, he must have been careless, and attempted to cross the track when he should not have done so," said the Supreme Court of Michigan in *Kwiatkowski v. Chicago & G. T. Ry. Co.*, 70 Mich. 551, 38 N. W. 463, 464; *Gardner v. Detroit, L. & N. Ry. Co.*, 97 Mich. 240, 56 N. W. 603.

(157 Fed. 174.)

UNITED STATES v. NATIONAL SURETY CO.

(Circuit Court of Appeals, Fifth Circuit. November 2, 1907.)

No. 1,654.

INTERNAL REVENUE—DISTILLER'S BOND—LIABILITY OF SURETY FOR TAX.

Where the government made an assessment against a distiller of the tax on spirits made from material used and not reported, and a portion of such spirits were found seized and sold, and the tax on such part paid from the proceeds, the surety on the distiller's bond, when charged with liability for the assessment, is entitled to credit for the part of the tax so paid, but not for the remainder of the proceeds of the sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Internal Revenue, §§ 64, 65.]

In Error to the Circuit Court of the United States for the Northern District of Georgia.

The following is the opinion of the Circuit Court, by Newman, District Judge:

In this case it appears that B. F. Witt was a registered distiller, and the National Surety Company of New York was surety on his distiller's bond. The government seized Witt's distillery, and in the distillery warehouse were 10 packages of distilled spirits, containing $416\frac{6}{10}$ gallons, the tax upon which, at \$1.10 a gallon, was \$458.26. After the seizure of the distillery, an assessment was made against Witt for distilled spirits made from material in excess of that reported as having been used by the distiller.

Counsel have made an agreed statement of facts in writing in this case, which is substantially as follows:

"It is agreed by and between counsel for both parties, plaintiff and defendant, in the above-stated case, that said case may be submitted to the court without the intervention of a jury, for consideration, determination, and adjudication, both as to the facts and law involved therein, and that the court be authorized to determine the facts, without the intervention and verdict of a jury, adjudge the law, make his findings, and render judgment thereon, as fully and completely as he could have done had the facts and evidence involved in said case been submitted to a jury for determination and verdict. It is further agreed that the facts involved in said case, and which shall be submitted to the court, are as follows, to wit: (1) That from and after the 15th day of December, 1903, and until the 10th day of May, 1904, the defendant, Benj. F. Witt, was engaged in the business of a distiller, and operated registered grain distillery No. 21, district of Georgia, at Georgetown, in the county of Quitman, said state. (2) Defendant admits the execution and delivery of the two bonds sued upon, referred to and described in the petition of the United States, which said bonds are hereby referred to and made a part of the evidence in this cause. (3) That on the 10th day of May, 1904, the distillery operated by the said Benj. F. Witt, for the operation of which said bonds were given, and which is named in said bonds, was seized by the United States authorities, together with the distillery premises, ten packages of corn whisky, containing 416.6 gallons, in the warehouse, one package of corn whisky, containing 26 gallons, found in the meal room near the distillery premises, and six packages, containing 258 gallons of corn whisky, found in the upper story of a gin house in the possession of one Sol Vining, situated about one-fourth of a mile from said Witt's distillery premises. That said gin house was not a distillery warehouse. It is agreed that the above-mentioned six packages of corn whisky found and seized in the gin house of Sol Vining, and the one package seized and found in Witt's meal house, was liquor that had been produced at the aforesaid distillery of B. F. Witt, and had not been put in the distillery warehouse, and that no warehouse stamps had been put on the aforesaid packages, and that the tax had not been paid thereon, and that said packages of corn whisky of said Witt were removed from said distillery and deposited in said gin house and meal room by and with the knowledge and consent of said Benj. F. Witt. It is further admitted that this whisky was distilled from meal and material used and not reported by said Witt to the collector, nor entered on his distiller's book. (4) It is further agreed that on the 14th day of June, 1904, the United States Commissioner of Internal Revenue assessed the defendant, B. F. Witt, \$585.20 taxes on 532 gallons of spirits not reported or warehoused by said Witt, as shown by the excess material used by him, and said assessment sheet is hereby referred to and made a part of the facts and evidence agreed upon in this cause. Notice of said assessment and demand for the payment of the taxes assessed was mailed to B. F. Witt, as provided by law, on the 16th day of June, 1904. (5) That three distraint warrants, Nos. 402, 403, and 428, dated, respectively, August 6, 1904, and October 27, 1904, were regularly issued by H. A. Rucker, collector of internal revenue—No. 402 being for the sum of \$585, amount of taxes, and \$35.40 interest and penalty; No. 403 being for \$140.36 and \$8.48 interest and penalty (afterwards abated by the government); No. 428 being for \$6.16 taxes and 36 cents interest and penalty—which said distraint warrants are referred to and made a part of the evidence and facts agreed on in this case. * * * (7) It is agreed that said assessment of \$585.20 is based on the failure of said B. F. Witt to account for 152 bushels of corn meal and material delivered and used at said distillery, which should have produced 532 gallons of whisky, said 532 gallons not being warehoused or reported by said B. F. Witt, the tax upon which should have been \$585.20, for which distraint warrant No. 402 was issued. (8) It is further agreed that no credit was entered in behalf of said B. F. Witt or said National Surety Company, surety on said bonds, on the assessments for the net proceeds of the sales of the seized whisky, to wit: Ten packages, netting \$71.79; one package, netting \$2.43; six packages netting \$48.49—and that no credit was entered for the net proceeds of the sale of the said distillery apparatus, amounting to \$85.50,

and that each of said several sums was covered into the treasury of the United States. (9) It is further admitted by defendants that no part of the assessment of \$585.20 assessed by the Commissioner of Internal Revenue for the month of May, 1904, against said Benj. F. Witt as taxes on spirits distilled by him during the period from March 19 to May 10, 1904, has been paid by either of the defendants in this case, except the net proceeds arising from the seizure and sale of said B. F. Witt's property, hereinbefore set out, which said proceeds and net sums arising from said sales defendant insists should be applied to the reduction of said assessment, interest, and penalty."

It will be perceived from the foregoing that it is admitted in this case that the distilled spirits seized outside the distillery warehouse in Vining's gin house, and in the meal room, was a part of the spirits made from excess material, and that the tax on spirits found, amounting to \$283.80, plus \$28.00, aggregating \$312.40, was paid out of the proceeds of the sale of this particular spirits. The question presented in the case is whether or not the surety on Witt's bond is entitled to have this credited on the amount of the assessment of \$585.20. It is claimed on behalf of the government that where spirits are seized and forfeited to the government, that although the tax on the same is paid out of the proceeds arising from its sale, the surety on the distiller's bond cannot set up that payment of tax as against the assessment covering the spirits so sold. In the case of the *United States v. Ulrich*, 111 U. S. 38, 4 Sup. Ct. 288, 28 L. Ed. 344, the question here involved was presented as to a distiller's warehouse bond. The general scope of the decision in that case may be gathered from the headnote, as follows: "The sureties on a distiller's bond for payment of taxes are discharged by seizure of the spirits for fraudulent acts of the distiller, and sale of them by the marshal, and payment of the taxes by the marshal out of the proceeds of the sale." In the opinion by Mr. Justice Woods, this language is used: "It is clear that the object of exacting this bond is to make sure the payment of the tax. It would seem, therefore, that if the tax is paid within the time limited, either by the distiller or out of the proceeds of the spirits subject to the tax, the object for which the bond was taken is accomplished, and it becomes *functus officio*, and the obligors are discharged. The contention of the counsel for the government is that the forfeiture of the spirits on which a tax is due for the fraudulent act of the distiller in seeking to evade its payment is a punishment for the offense, criminal or quasi criminal, of the distiller, and that the application of the proceeds of the forfeited spirits to the payment of the tax cannot have the effect of relieving him from the obligation of his bond. Such, in our opinion, is not the true construction of the law regulating the imposition and collection of the tax on distilled spirits."

It is said, however, on behalf of the government, that the bond in question in the *Ulrich* Case was a warehouse bond, that the bond in this case is a distiller's bond, and that the two bonds are differently conditioned. A distiller's bond (section 3260, Rev. St. [U. S. Comp. St. 1901, p. 2114]) is "conditioned that he shall faithfully comply with all the provisions of law relating to the duties and business of distillers, and shall pay all penalties incurred or fines imposed on him for a violation of any of the said provisions." A warehouse bond is "conditioned that the principal named in said bond shall pay the tax on the spirits as specified in the entry, or cause the same to be paid, before removal from said distillery warehouse," etc. I do not think the difference in the two bonds, or the character of the bonds, is at all material in determining the question here involved. To my mind, the point is that the surety, so far as liability is claimed in this case, agrees to become responsible for the taxes accruing against the distiller. That there is such liability for taxes on a distiller's bond is now settled. It is one of the "duties" assumed by the surety on the distiller's bond. *United States v. National Surety Company*, 122 Fed. 904, 59 C. C. A. 130, and cases cited. As to the present suit, the effort is to make the surety pay the tax on spirits which, according to the government's rule and its calculation, was made from material used and not reported. A part of the liquor made from the material not reported was found and sold, and the tax on the part so found paid to the government. Now, so far as that part of the tax is concerned, can the surety on the bond be required to pay it to the government again? Whatever the liability on a distiller's bond as

distinguished from a warehouse bond may be otherwise, it is not material here; the simple question presented in this case being the one just stated, and I understand that question to be fully answered by the decision of the Supreme Court in the *Ulrici* Case. Counsel for the government has cited and relies upon the case of *United States v. United States Fidelity & Guaranty Co.*, 144 Fed. 866, decided by District Judge Platt, for the District of Connecticut. Judge Platt did not consider the *Ulrici* Case in point in the case he was deciding, and it probably was not. It is not entirely clear from that case as reported what property was sold, the proceeds of which the surety desired credited as against his liability on the bond. But it is spoken of as "distillery property"; and if it is true that the distillery premises were sold, or any property of the distiller other than the spirits on which the assessment was made, an entirely different question was presented from that arising in this case. The tax on the spirits sold here had to be paid because it could not be turned over to the purchaser without the stamps being affixed, and the purchase of the stamps, of course, paid the tax. The facts here, in my opinion, brings the case squarely within the decision of the Supreme Court in the *Ulrici* Case. I do not think, however, that the surety is entitled to have a set-off as against its liability for the assessment for excess material, for any more than the tax actually paid to the government on the spirits seized. The small excess received from the spirits sold, over the tax and expenses, should be treated, I think, as forfeited to the government. It is because the tax has been once paid out of the proceeds of the spirits sold that the surety is entitled to credit for the same. The result is that the government is entitled, as against the surety company, to a judgment for the difference between \$585.20, the amount of the assessment on the excess material, and \$312.40, the tax paid on the spirits seized in Vining's gin house and in his meal room, leaving a balance of \$272.80, for which amount, with interest and penalty, the government is entitled to a judgment.

F. C. Tate, U. S. Atty., and John W. Henley, Asst. U. S. Atty.
Charlton E. Battle and W. G. Love, for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and BURNS, District Judge.

PER CURIAM. This is an action on a distiller's bond, conditioned as follows: "If the said Benjamin F. Witt shall, in all respects, faithfully comply with all the provisions of law relating to the duties and business of distillers, and shall pay all penalties incurred or fines imposed on him for a violation of any of the said provisions, and shall not suffer the lot or tract of land on which the distillery stands, or any part thereof, or any of the distilling apparatus, to be incumbered by mortgage, judgment or other lien, during the time in which he shall carry on said business, then this obligation shall be void; otherwise it shall remain in full force"—to recover an assessment for taxes amounting to \$585.20, with interest, and the specific penalty of 5 per cent. thereon on 532 gallons of distilled spirits not reported or warehoused, and theretofore in part seized and sold by the United States, and in which the surety claims that the proceeds of the sale should be applied to the payment of the tax assessed on the spirits sold. The Circuit Court considered the case identical in principle with *United States v. Ulrici*, 111 U. S. 38, 4 Sup. Ct. 288, 28 L. Ed. 344, and gave judgment accordingly. The opinion of the court, Newman, Judge, as found in the transcript, is elaborate, and we concur in the reasoning and conclusion.

Judgment affirmed.

(157 Fed. 178.)

BURKE v. UNION COAL & COKE CO.

(Circuit Court of Appeals, Eighth Circuit. November 8, 1907.)

No. 2,544.

1. MASTER AND SERVANT—ASSUMPTION OF RISK.

An employé who was at work in a tunnel from 5½ to 7 feet in height, repairing the track of a railroad operated by electricity by means of a trolley which ran on a wire suspended 5 or 6 inches beneath the right side of the roof of the tunnel, who had been warned to look out for the wire, that contact with it might kill him, and who had been once knocked down by electricity from it, stopped from his work of driving a wedge under a rail beneath the wire, arose from his stooping position until his neck struck it and was killed by the electricity therefrom. *Held*:

The employé assumed the risk of injury from the wire by entering and continuing in the employment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574-600.]

2. SAME.

A servant, by entering or continuing in the employment of a master, assumes the risks and dangers of the employment which he knows and appreciates, and those which an ordinarily prudent and careful person of his capacity and intelligence would have known and appreciated in his situation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574-600.]

3. SAME—DEFECTS ARISING FROM NEGLIGENCE OF MASTER.

Among the risks and dangers which the servant assumes by entering or continuing in the employment without complaining of them are those which arise from defects that are obvious or readily observable through the failure of the master to completely discharge his duty to exercise ordinary care to furnish the servant with a reasonably safe place to work and with reasonably safe appliances to use.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 610-624.]

4. SAME—ESTOPPEL FROM DENYING APPRECIATION.

An employé cannot be heard to say that he did not appreciate or realize the risk or danger where the defects were obvious, and the dangers would have been apparent to an ordinarily prudent person of his intelligence and experience in his situation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 610-624.]

5. SAME—PEREMPTORY INSTRUCTION WHEN PROPER.

Where the uncontradicted evidence discloses the fact that the defects in the place or machinery or method of operation were obvious, and the danger from them apparent to an ordinarily prudent person of the intelligence and capacity of the servant, and that the servant entered upon or continued in the service without complaint of them, the defense of assumption of risk is conclusively established, there is no question for the jury, and the court should instruct them to return a verdict for the master.

[Ed. Note.—Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Colorado.

Hugh Butler, for plaintiff in error.

William E. Hutton (Bruce B. McCay, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. This writ of error challenges an instruction to the jury to return a verdict for the defendant upon this state of facts:

The Union Coal & Coke Company, the defendant below, was operating a coal mine and a tunnel 2,000 feet long, which led to entries in the mine. The tunnel was from 5½ to 7 feet in height, and there was a railroad track about 7 inches above the level of the floor of the tunnel, and a wire in the right upper corner of it, by means of which and a trolley, cars, which were used to bring the coal from the mines, were moved. There was a switch, by which the electricity could be turned off of the wire when the trolley was not in use, and the wire could be charged again when desired. When the wire was charged it carried 550 volts, and contact with it was dangerous to human life. The cars upon this railroad had been operated by electricity in this way for more than a year when Michael W. Burke, who was the husband of Mary A. Burke, the plaintiff below, was employed by the defendant to assist in laying and repairing the track of the railroad on June 19, 1905. This track included not only the rails in the tunnel upon which the cars were moved by electricity, but also many thousand feet of rails in the entries in the mine and upon the surface of the ground, upon which the cars were operated by the use of mules. The foreman of the mine testified, and his testimony was not contradicted, that he warned Burke when he hired him "that his work was track work, and that it was around wire and timber and such as that, and that he would have particularly to look out for the wire; * * * that if he came in contact with it he was likely to be killed; * * * that whatever he done, to watch out for the wire, that it was dangerous, and if he got tangled up with it, it would kill him, any man—that it had 550 volts in it;" that Burke worked continuously, except upon Sundays, from the 19th to the 27th of June, that about June 23d, there was a cave in, in the tunnel, and while Burke was at work with other men removing the débris with one hand on the ferule of his shovel he permitted the latter to come in contact with this live wire, received a shock from it which knocked him down, and that when Burke told the foreman of it he told him that he "wanted him to be very careful, and keep away from the wire; that if he did not he would tangle up in it and get killed." On June 27, 1905, Burke was repairing track in the tunnel with a fellow workman named Regnier. Just prior to the accident the motor or the cars came along and Regnier stepped off the track upon the left side and Burke upon the right side to let them pass. There was a crosscut or opening at this point upon the right side of the tunnel, which extended about 30 feet, and Burke stepped into it. The live wire was suspended on hangers beneath the roof of the tunnel about six inches to the right of the right rail. As Burke went into

the crosscut to let the motor or cars pass he stooped under this wire so that he did not come in contact with it. After he had returned to his work, he was engaged in driving a wedge under the left rail when Regnier procured a heavier hammer, and asked him to step aside and let him drive the wedge. Burke stepped over to the right side of the tunnel, and straightened up so that his neck came in contact with the live wire, and the electricity immediately killed him. His widow brought this action for damages, which she alleged she suffered from the negligence of the company, because it operated its cars by electricity, because it did not protect the wire by an inverted trough, because it did not construct a tunnel of greater height. But it will not be necessary to consider these charges of negligence. The court below instructed the jury for the defendant on the ground that the evidence demonstrated the fact that Burke assumed the risk of injury from the wires, and in the consideration of this question it is not decided that there was any substantial evidence of the acts of negligence above charged, but the assumption will be indulged that the company was negligent in those particulars.

Counsel for the plaintiff contends that the judgment should be reversed because the deceased was not duly warned of his danger from the electricity upon the wire, and did not appreciate the risk of it, in that he was not told and did not know the height of the tunnel, in that he was not told and did not know the dangerous proximity of the wire to the track, because the credibility of the foreman was a question for the jury and not for the court, and because a servant never assumes the risk of his master's negligence. Many instructive authorities have been cited, and every argument that profound learning and commanding ability could proffer, has been presented to maintain this contention. The authorities and arguments have been thoughtfully considered, but after another review of the rules and principles which govern cases of this character, which have been so often reviewed by this court, we have been forced to the conclusion, in the light of the earlier and of the later decisions, that the controlling rules are correctly declared in *St. Louis Cordage Co. v. Miller*, 126 Fed. 495, 508, 61 C. C. A. 477, 490, 63 L. R. A. 551, and *Glenmont Lumber Co. v. Roy*, 126 Fed. 524, 528, 61 C. C. A. 506, 510, in these words:

"A servant, by entering or continuing in the employment of a master without complaint, assumes the risks and dangers of the employment which he knows and appreciates, and also those which an ordinarily prudent person of his capacity and intelligence would have known and appreciated in his situation.

"Among the risks and dangers thus assumed are those which arise from the failure of the master to completely discharge his duty to exercise ordinary care to furnish the servant with a reasonably safe place to work and reasonably safe appliances and tools to use.

"An employé cannot be heard to say that he did not appreciate or realize the danger where the defects are obvious, and the dangers would have been known and appreciated by an ordinarily prudent person of his intelligence and experience in his situation.

"Where the uncontradicted evidence discloses the fact that the defects in the place or in the tools were obvious, and the dangers from them would have been apparent to an ordinarily prudent person of the intelligence and the capacity of the servant, if placed in his situation, and the employé entered upon or continued in the service without complaint, the defense of assumption of

risk is conclusively established, and the court should instruct the jury to return a verdict for the defendant."

Ample warning of the danger of the live wire was twice given the deceased by the foreman, and this warning was emphasized by a shock from it which knocked him down. The height of the tunnel and the proximity of the wire to the track were obvious. No person of ordinary prudence would have failed to observe them or to appreciate the risk from them. At the very place where the deceased was injured he had shortly before the accident stooped to pass under the wire as he went to the right of the tunnel to let the motor pass. The credibility of the foreman might have been a question for the jury if it had been inconsistent with other testimony or with the facts or circumstances in evidence, but it stood unassailed by any fact, circumstance, or testimony, and a verdict founded upon the conclusion that it was not true would have been contrary to all the evidence and without justification.

The contention that the servant never assumes the risk of the negligence of the master is untenable in the national courts. The rule established by repeated decisions of the Supreme Court is that by entering or continuing in the employment a servant assumes the risk of defects in the place and in the machinery caused by the negligence of the master, when those defects are obvious or plainly observable by a person of ordinary prudence in the servant's situation as completely as he assumes those of which he is actually aware. *Texas Pacific Ry. v. Archibald*, 170 U. S. 665, 672, 18 Sup. Ct. 777, 42 L. Ed. 1188; *Choctaw, Oklahoma & Gulf R. R. Co. v. McDade*, 191 U. S. 64, 68, 24 Sup. Ct. 24, 48 L. Ed. 96.

Nor can the plaintiff recover upon the ground that the deceased did not appreciate the risk. The defects in the tunnel, in the railroad, in the wire, in its location and in the methods of the operation of the railroad and of its repair, were obvious. A servant of ordinary intelligence and prudence in Burke's situation, with the warnings he had received, could not have failed to know or to appreciate the risk which he ran from them. A servant cannot be heard to say that he did not appreciate or realize the risk or danger from defects which were readily observable, and the dangers of which would have been apparent to an ordinarily prudent person of his experience and intelligence in his situation. *St. Louis Cordage Co. v. Miller*, 126 Fed. 495, and cases cited at pages 511, 512, 513, 61 C. C. A. 477, 63 L. R. A. 551.

In the trial of this case the court below followed the established rules of law in giving an instruction to the jury to return a verdict for the defendant, and this judgment cannot be reversed without disregarding them.

It is accordingly affirmed.

(157 Fed. 182.)

BORT v. E. H. McCUTCHEN & CO. et al. *

(Circuit Court of Appeals, Eighth Circuit. October 22, 1907.)

No. 2,502.

DEPOSITARIES—BONDS—RIGHT OF ACTION FOR BREACH—BOND TO CORPORATION AND OFFICER JOINTLY AND SEVERALLY.

Plaintiff was elected head banker of the Modern Woodmen of America, an incorporated fraternal society, and as such became custodian of its funds. As required by the by-laws, he gave a bond for the faithful performance of his duties, among which was the depositing of all money in depositories, selected by him but approved by the directors of the society. He was authorized to transfer funds from one depository to another, but not to withdraw them for any other purpose except upon checks, also signed by other officers. Notwithstanding such deposits, the by-laws provided that he should remain personally liable for the safe-keeping and forthcoming of the funds when required, and that the approval by the directors of a depository, and a bond given by it, should not relieve him from such liability on his own bond. A by-law provided that bonds of depositories should be made payable "to the head banker and to the Modern Woodmen of America, or either of them," and that they should be executed in duplicate, one to be held by the head banker, and one by the board of directors. Such a bond, given by an approved depository, referred to such by-law, and ran to plaintiff by name as head banker, and to the society "jointly and severally," and was conditioned in a penal sum to be paid to plaintiff "as head banker of said Modern Woodmen of America, and to the said Modern Woodmen of America, or either him or it." *Held* that, construing the language of such bond in view of relations between the society and plaintiff, and the latter's continued responsibility for the funds, it was clearly intended, not only as security for the society, but also as personal security for plaintiff—no reference being made therein to his successor in office; that on the death of the principal, and the refusal of his representatives to transfer the funds on deposit on his demand, plaintiff could maintain an action thereon, against the sureties, in his own name, even though his term of office had expired before the action was commenced.

In Error to the Circuit Court of the United States for the Northern District of Iowa.

For opinion below, see 147 Fed. 626.

Craig L. Wright and Asa F. Call, for plaintiff in error.

Will E. Johnston, Elbert H. Hubbard, and Eric A. Burgess, for defendants in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. This was an action by A. N. Bort, who was formerly head banker of the Modern Woodmen of America, a fraternal society organized under the laws of Illinois, to recover in his personal right upon a bond given by McCutchen & Co. as principal, and others as sureties, conditioned for the performance, by the principal, of certain obligations as a depository of funds of the society. The society was also made a defendant. Defendants, other than the society, demurred to the petition, and the demurrer was sustained by the trial court upon the ground that Bort was not personally secured by the bond, and therefore had no cause of action for the default of the depository. He stood upon his petition, and judgment went against him; hence this writ of error.

*Rehearing denied February 22, 1908.

The facts disclosed by the petition are as follows: Bort was elected head banker of the society, a position like that of a treasurer, and by virtue of his office became the custodian of its funds. As required by the by-laws, he gave bond to the society in the sum of \$500,000 for the faithful performance of the duties of his office. Among the duties imposed on him, and particularly specified in his bond, was that of depositing all funds of the society received by him in one or more depository banks, selected by him, but acceptable to, and approved by, the board of directors of the society. Notwithstanding funds were so deposited he remained personally liable for their safe-keeping and forthcoming when required. In other words, Bort vouched, not only for his own integrity, but also for the integrity and financial responsibility of the depositories. The funds on deposit with the depositories were at the risk of Bort, and his personal bond, just referred to, contained a provision, conforming to a by-law of the society, that the approval by the board of directors of a designated depository, the giving of a bond by such depository, and the fact that it was made payable to the society, should not relieve Bort and his sureties from liability for the default of the depository. Under the by-laws the head banker had authority, acting alone, to transfer funds from one depository to another, but withdrawals for all other purposes were subject to such checks and counter signatures as deprived him of individual control over them, though his liability remained. Upon his election as head banker, Bort designated E. H. McCutchen, who did a banking business as E. H. McCutchen & Co., as one of the depositories, and the latter thereupon gave bond in the sum of \$200,000, conditioned, among other things, for the payment of all orders drawn in accordance with the by-laws on the funds deposited. The bond was approved by both Bort and the board of directors of the society. This is the bond in suit. Bort then deposited with McCutchen & Co. \$100,000 of the funds of the society. About six months afterwards McCutchen died. Bort, as he was authorized to do, drew orders in favor of another depository, exhausting the funds with McCutchen & Co.; but the orders were dishonored, and a breach of the bond in suit was thereby committed which the personal representatives of McCutchen and the sureties refused to make good. All this occurred while Bort was head banker. In the following year his term of office expired. He accounted to the society for all funds chargeable to him excepting those with McCutchen & Co., and as the society asserted his liability therefor upon his individual bond as head banker, he brought the action in the court below upon the bond of the depository.

A by-law of the society, referred to in the bond in suit, provided that bonds given by depositories should be made payable "to the head banker and to the Modern Woodmen of America, or either of them," and that they should be executed in duplicate, one to be held by the head banker and one by the board of directors of the society. Also, that the approval of such bonds by the board of directors should be with the concurrence of the head banker. The bond given by defendants, McCutchen and sureties, provides that they are firmly held "unto A. N. Bort, as head banker of the Modern Woodmen of America, a corporation duly organized and existing under and by virtue of

the laws of the state of Illinois, and to the said Modern Woodmen of America, jointly and severally, in the penal sum of two hundred thousand dollars (\$200,000), lawful money of the United States, to be paid unto the said A. N. Bort, as head banker of said Modern Woodmen of America, and to the said Modern Woodmen of America, or either him or it, for the payment of which sum, well and truly to be made," etc. It is contended by Bort that the bond in suit has two distinct aspects: First, that it is for the protection of the society, and, as such, is in addition to that furnished by his own bond; and, second, that it is for his personal benefit since, under the by-laws and the terms of the bonds, the funds of the society remained at his personal risk after deposit with the depository. The society answered, admitting the averments of the petition and disclaiming further interest. The defendants who demurred contend that the references to Bort in the bond are in respect of his official position and not otherwise, and that, as he had ceased to be head banker, there could be no recovery in his personal right.

In the construction of a writing of doubtful import a knowledge of the atmosphere in which it grew is frequently helpful, and sometimes essential, to a true conception of the intent of the parties. There is no set formula for the expression of ideas; the words and phrases selected by contracting parties differ almost as widely as their personal characteristics. If the significance of the written words is plain to a common intent, that is the end of it; but if not, a view of the positions of the parties and their relations to each other and to the subject-matter of their contract often discloses, with convincing clearness, what they were seeking to attain. The ascertainment of the true intention is the great rule for the construction of contracts, and the favor with which the law regards a surety does not make his undertakings an exception. The case before us is plainly one for the summoning of those well known aids to the construction of an ambiguous text, for there is that in the bond which indicates more than a mere purpose to secure the society alone, in respect of the safe-keeping and forthcoming of the funds.

A consideration of the relations between the society and the head banker, and the latter's continued responsibility for the funds with the depository in connection with the terms of the bond in suit, makes it altogether clear that it was intended that the bond should also stand as personal security for the head banker. The provision of the by-laws that the bond should be payable to both or either of them—a provision that would be unusually tautological under any other construction—is at once explained. But it is said there is no reference in the bond to the by-law imposing a continued responsibility for the funds upon the head banker, and nothing else in it indicating that the makers of the bond intended to bind themselves to him in his personal capacity. But we think that a view of the terms of the bond, and of those things to which attention is directed by its recitals, fairly leads to the conclusion that a dual security was intended—a security for the society and a security for Bort, personally. Any other construction would result in there being but one beneficiary in the bond—the society; for Bort, in his official capacity, was, in legal contemplation, the society itself. Such a

construction would not consist with the studied effort of all of the parties to have a bond with two beneficiaries, whose rights became several and distinct if they chose to make them so. All parties knew that Bort was head banker and the custodian of the funds of the society; that, under the by-laws, he was authorized to appoint a depository subject to the approval of the board of directors; that the initial act in the selection of a depository was his, and that without it no bank or banker could secure such funds, even with the aid of the governing board of the corporation; that when a depository, duly selected and confirmed, came to give its bond, the approval thereof by the board of directors had to meet with Bort's concurrence; that while he was powerless, acting alone, to withdraw funds from a depository for usual corporate purposes, he had unrestricted authority to take them wholly from one depository for deposit with another. The bond in suit runs to Bort as head banker and the society "jointly and severally," and the signers undertook to pay the penal sum to Bort, as head banker, and the society, "or either him or it." The bond was required to be made in duplicate, one copy for Bort and the other for the board of directors. Finally, there is no provision in the bond that it should run to Bort's successor in office. Why all this elaborate machinery if it was not known that the deposit of the funds was at Bort's personal risk, and if it was not intended to secure him against loss? The claim that the mention of Bort's name in the bond should be disregarded, and that his office alone should be considered, logically drives defendants to the further contention that there is but one beneficiary, who, in the last analysis and in legal contemplation, is the society itself. But this does not accord with the manifest purpose to provide for two obligees, and to give to each a several right of reliance upon the security. There is no discernible reason for the double aspect of the relations between the parties, exhibited by the by-laws recited in the bond and by the terms of the bond itself, that is consistent with the construction sought by defendants, while there is a clear harmony with a purpose to provide security for Bort, personally, and the society, jointly and severally, either him or it.

It is contended that the words "jointly and severally" refer to the obligation of the makers of the bond, rather than to the rights of the obligees, but this is contrary to the obvious sense in which the words were used. Were the true construction in this particular at all doubtful, it would be made plain by the subsequent addition of the words "or either him or it" to the conjunction of the names of Bort and the society. It is also contended that the word "as," placed between Bort's name and the title of his office, means that his official character was intended. That is ordinarily the signification, but it is not conclusive. The word "as" is frequently dropped as surplusage, where it appears that its use is inapt or that the title of the office or position following it is intended by way of more definite designation of the person named. It is said that all of Bort's acts in these matters were official. That is true in a sense, yet, when the consequences to him are regarded, they also assume a personal aspect. His was not the usual liability for official misconduct, for, however honestly and faithfully he acted, there was ever present a personal responsibility for the funds of the society;

and everything he did, affecting their custody or deposit, was attended by personal consequences. In this view it would be difficult to draw a line of demarcation between the official and personal qualities of his acts in the premises.

There are some other contentions of defendants, mainly relating to the effect upon the bond and the rights and duties of the parties, of the death of McCutchen, and particularly one that the bond imposed upon McCutchen duties requiring the exercise of personal judgment, skill, and discretion, which his death rendered impossible of performance, thereby resulting in the discharge of the sureties. We have considered but are unable to sustain them.

The judgment is reversed, and the cause remanded with directions to overrule the demurrer, and permit the demurring defendants to answer.

(157 Fed. 186.)

CALIGA v. INTER OCEAN NEWSPAPER CO.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1907.)

No. 1,365.

1. COPYRIGHTS—INFRINGEMENT—ACTION FOR STATUTORY PENALTY.

Strict construction and proof are required in an action under Rev. St. § 4965 [U. S. Comp. St. 1901, p. 3414], to recover the penalty thereby authorized for infringement of a copyright.

2. SAME—COMMON LAW AND STATUTORY COPYRIGHT.

The common law gives the author of a painting the exclusive right to reproduce the same so long as he does not make publication, but on publication such right is lost, and he can only acquire the right to further protection by a statutory copyright.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Literary Property, § 4.

Rights of authors to control of publication, disposition, or use of their productions independent of statutory copyright, see note to *Bobbs-Merrill Co. v. Straus*, 77 C. C. A. 620.]

3. SAME—VALIDITY—DOUBLE COPYRIGHTING.

But a single valid copyright can be obtained upon the same subject-matter; and an artist by depositing the name and description of a painting in the prescribed office did not acquire a copyright thereon, where he had previously deposited a photograph of the same painting under a different name and description for the purpose of obtaining a copyright, unless it is shown by proof that such prior deposit was inoperative.

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

The plaintiff in error was plaintiff below in an action of debt, under section 4965, Rev. St. [U. S. Comp. St. 1901, p. 3414], against the Inter Ocean Newspaper Company, for violation of copyright of the plaintiff's painting, and the writ of error is brought from a judgment therein in favor of such defendant, upon trial and directed verdict.

The declaration avers, in substance: That the plaintiff was the author, designer, and proprietor of an oil painting thus described: "The Guardian Angel. Portrait of a young girl sitting, hair arranged smoothly over the ears, hair parted in the middle. Her guardian angel stands behind her, one hand resting on her left shoulder, the other on her right arm." That it had not been theretofore published. That he did, "to wit, on or about the 5th day of

November, A. D. 1901," take steps, as recited, to obtain a copyright. That such description of the painting was duly recorded by the Librarian of Congress, "to wit, on or about the 7th day of November, A. D. 1901." That the painting was thereupon duly copyrighted. That notice of such copyright was inscribed upon the painting, and that the plaintiff is sole owner and proprietor of such copyright and painting. Infringement by the defendant is averred in printing and publishing copies of the painting in its newspaper, "to wit, upwards of 1,000 copies thereof," on or about October 25, 1903.

Under plea of general issue the trial proceeded before a jury, with proof on behalf of the plaintiff primarily, supporting the declaration in a copyright of the date and description alleged, and publication by the defendant without consent. In the testimony of the plaintiff, however, it further appeared, and was conceded to be the fact, that the plaintiff had procured a copyright of the identical painting on October 7, 1901, under the description: "Maidenhood. A young girl seated beside a window. An angel stands behind her." Also, that the painting was submitted to Curtis & Cameron, publishers, prior to October, "to have the picture published by them," and was photographed for that object.

Thereupon the court instructed the jury to find the defendant not guilty, and verdict was rendered accordingly. Error is assigned in various forms, both upon the direction so given and refusal of several instructions requested on behalf of the plaintiff, but the reviewable questions arise under the direction of verdict.

Otto R. Barnett, for plaintiff in error.

Clarence A. Knight, for defendant in error.

Before GROSSCUP, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). This suit is for recovery of the penalties imposed by statute (section 4965, Rev. St. [3 U. S. Comp. St. 1901, p. 3414]) for violation of an alleged copyright of a painting produced and owned by the plaintiff in error. With recovery so sought, under the special right conferred by statute and not existing at common law, the rule is elementary which requires strict construction and proof for enforcement of such right. *Wheaton v. Peters*, 8 Pet. 591, 663, 8 L. Ed. 1055; 3 Notes U. S. Rep. 485; *Mifflin v. R. H. White Co.*, 190 U. S. 260, 264, 23 Sup. Ct. 769, 47 L. Ed. 1040; *Bobbs-Merrill Co. v. Straus*, 147 Fed. 15, 21, 23, 77 C. C. A. 607; *White-Smith Music Pub. Co. v. Apollo Co.*, 147 Fed. 226, 227, 77 C. C. A. 368. The trial court directed a verdict of not guilty, upon the view that no valid copyright appeared under the registration of November 7, 1901, not only averred in the declaration, but proven and relied upon on the trial. Such ruling was predicated upon the fact—disclosed in cross-examination of the plaintiff in error and subsequently admitted of record—that the author had procured a prior registration on October 7, 1901, by filing "a photograph of the painting in question," with this description: "Maidenhood. A young girl seated beside a window. An angel stands behind her." In the registration of November 7th the name was changed to "The Guardian Angel," with description amplified; and the only question for review, in our understanding of the issues and conceded facts, including the transactions with and of Curtis & Cameron, is whether the statutory copyright was acquired by this registration in suit.

While the bill of exceptions show no claim or offer made on behalf of the plaintiff in error under the registration of October 7th, either

in the course of the testimony or in the instructions requested and referred to in the assignments of error, reversal is sought upon the contention that recovery was authorized under one or the other registration, and the direction was erroneous in either view. The propositions are, in substance, that the date of the copyright was "pleaded under a *videlicet*," and the (assumed) variance in proof was not fatal, because the particular date in such allegations is to be treated as forming no material part of the issue of fact tendered by the declaration, when the defendant is not misled or surprised. Were it true that such variance appeared between the averment and proof, and in date alone, it may be that the authorities cited would then be applicable to disregard the mere difference in date, where a single registration was proven. In this instance, however, the averment and proof are identical, both in date and subject-matter, so that no question of variance arises. The sole issue tendered and heard was upon this November registration as creating the alleged copyright, with no reference to the prior registration or intimation thereof until that fact was brought out by the defense by way of impeaching the claim in suit; and without proof applicable at least to the October registration, meeting the strict requirements for penal recovery, submission to the jury was not authorized in any view of the issue joined. The question whether a valid copyright was acquired under the prior registration is not therefore open for review, although the effect of that procedure must be considered in testing the validity of the right set up under the November registration for penal recovery.

With the controversy thus narrowed, as we believe, the various other propositions which are discussed by counsel, together with the numerous authorities cited and reviewed thereupon, are not within the issue. Recent authorities have so clearly settled the rule as to the bearing and status of the common-law copyright, when the statutory benefits are invoked, that these deductions are deemed sufficient to answer the contentions thereunder: The property rights of the author in his production, intellectual or artistic, are twofold—absolute ownership of the corporeal production, alike with other property ownership, and an independent right to make duplications, which is equally his own so long as he withholds from publication to the world. The first-mentioned right is unaffected by either class of copyright, and one or both are subject to his disposition, absolute or qualified, in common with other property rights. While publication is withheld, his right of first publication is exclusive. When he voluntarily releases to the public, by general publication, this common-law right of exclusive publication is surrendered. Unless he obtains on or before publication the protection of the statutory copyright, the public is unrestrained in duplications. With the copyright obtained, his right to publish and sell all copies becomes exclusive thereunder for the statutory term. Thus the benefits of the statute are substituted for the imperfect benefits of the common-law ownership by his surrender of the perpetual right to withhold from publication. These rights are separate and not coexistent. The common-law right ends when the statutory right begins. *Holmes v. Hurst*, 174 U. S. 82, 85, 19 Sup. Ct. 606, 43 L. Ed. 904; *Bobbs-Mer-*

rill Co. v. Straus, 147 Fed. 15, 18, 77 C. C. A. 607; Drone on Copyright, 100.

The validity of the copyright in question is challenged upon two grounds: (1) Disclosure of a prior (*prima facie*) copyright of the same subject-matter, under the October registration; (2) prior publication, either under the transactions of Curtis & Cameron, or through the October registration. If one or the other of these objections is supported by the evidence referred to, no escape appears from the conclusion that the objection is fatal.

1. Whether the registration of October resulted in a valid copyright is not, as before mentioned, involved in the issue. Nevertheless the conceded fact of such registration by the plaintiff in error must be considered in testing the validity of the alleged copyright under the subsequent filing. The contention in support of the copyright is substantially this: That the established rule of the patent law against duplication of patents for the same invention (*Miller v. Eagle Manuf. Co.*, 151 U. S. 186, 197, 14 Sup. Ct. 310, 38 L. Ed. 121; 12 Notes U. S. Rep. 485) is not applicable to copyrights, because no express grant of monopoly issues as in the case of patents, and that duplications of registry for the same subject-matter are allowable, and so recognized in *Black v. Allen* (C. C.) 56 Fed. 764, 769. Neither of these contentions impresses us as tenable. The grant of monopoly is conferred alike by statute in both instances, upon due application, although in respect of patents the methods differ in the needful discrimination for patentability and in the form of issue. The applicant for a copyright (section 4956, Rev. St. [3 U. S. Comp. St. 1901, p. 3407]) deposits in the office of the Librarian the required matter, and record is there made. Upon compliance on the part of an author with this requirement, the grant ensues, as of course, under section 4952, Rev. St. [3 U. S. Comp. St. 1901, p. 3406]. So the copyright is equally a grant, however simple the method of acquiring, and when once conferred there is neither authority nor occasion for a second grant to the author for the same production. Duplication is necessarily inoperative, as in the case of the patent for invention, and the authorities are harmonious in this view. *Mifflin v. Dutton*, 112 Fed. 1004, 1005, 50 C. C. A. 661, 61 L. R. A. 134, affirmed 190 U. S. 265, 23 Sup. Ct. 771, 47 L. Ed. 1043; *Lawrence v. Dana*, 4 Cliff. 1, Fed. Cas. No. 8,136. For new matter only in new editions can another copyright be obtained. *Id.*; Drone on Copyright, 146. In the case of *Black v. Allen* (C. C.) 56 Fed. 764, 769, cited contra, which arose in equity and involved equitable considerations, the present inquiry and strict view of the proceedings for copyright were not passed upon, nor do we understand the opinion or ruling to rest the rights of the complainant upon duplication of copyright. It goes without saying that the author is bound only by such filing for copyright as he authorizes or adopts.

As the statutory copyright is acquired through the simple act of the author in making the deposit, the admission that he made such deposit in October, even referring to it in his testimony as his "first copyright," clearly impeaches the alleged copyright of November, unless accompanied by proof that the prior deposit was inoperative. No such proof appears, and none was offered. The mere fanciful change in naming

the painting, "The Guardian Angel" on the second filing, instead of "Maidenhood," as previously designated, cannot be accepted for a new grant of copyright; nor the further details in the description, when those first given were plainly sufficient for identity. Whatever the rights may be for filing notice of change of name adopted for the author's work, no sanction appears for this independent filing of the matter, unexplained, as another copyright. We are of opinion that such course was confusing and unauthorized by way of copyright, and that the transaction cannot be upheld in the face of the conceded facts.

2. The question whether publication does not appear, prior to the November registry, either in the transactions of Curtis & Cameron, under their arrangement with the author, or in the fact of registration of the photograph and description in October, does not require solution under the foregoing view. The authorities cited for the contention that such registration amounts to publication are the well-considered cases of *Bobbs-Merrill Co. v. Straus*, supra, 147 Fed. 21, 77 C. C. A. 607, and *Jewelers' Mer. Agency v. Jewelers' Pub. Co.*, 155 N. Y. 241, 254, 49 N. E. 872, 41 L. R. A. 846, 63 Am. St. Rep. 666; and in view of the purpose and publicity of the registration, this objection, to say the least, could not be set aside without careful consideration, the statute providing (section 4956, supra) that the matter must be filed "on or before the day of publication." We refrain from decision thereupon, content to rest affirmance of the judgment upon the first-mentioned ground.

The judgment of the circuit court is affirmed.

(157 Fed. 190.)

REDD v. BRUN et al. (two cases).

(Circuit Court of Appeals, Eighth Circuit. November 8, 1907.)

Nos. 2,407, 2,408.

1. LIMITATIONS OF ACTIONS—COLORADO STATUTE BARS THREE YEARS AFTER DISCOVERY OF FACTS WHICH WOULD AWAKEN INQUIRY.

The statute of Colorado (section 2911, Mills' Ann. St.), which requires bills for relief on the ground of fraud to be filed within three years after discovery of the facts constituting the fraud, bars such suits three years after the discovery of facts which would awaken a person of ordinary prudence to an inquiry, which, if pursued with reasonable diligence, would lead to a discovery of the fraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 480-493.]

2. EQUITY—LACHES—APPLIED IN ANALOGY TO STATUTE—BURDEN ON COMPLAINANT TO PROVE DILIGENCE AFTER STATUTORY PERIOD.

The federal courts, sitting in equity, are not bound by, but they apply the doctrine of laches in analogy to, the statute of limitations of actions at law, and, in the absence of extraordinary facts and circumstances, decline to sustain suits commenced after the statutory period.

If a complainant would maintain a suit instituted after the expiration of the statutory limit, he must plead and prove especial facts or circumstances which show that he was not guilty of laches which take his case out of the ordinary rule and make it equitable to allow its maintenance after the statutory period has expired.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 242-244.]

*Rehearing denied January 11, 1908.

3. SAME—FAILURE TO DISCOVER FRAUD—PLEADING AND PROOF REQUISITE TO EXCUSE.

If he failed to discover the fraud within the statutory limit, he must plead and prove the time when he discovered it, the means by which he found it out, the impediments which prevented its earlier discovery, and the diligence he exercised.

If by the exercise of ordinary diligence he could have discovered it in time to have brought his suit within the limit fixed by the statute, he was guilty of laches, and his suit cannot be maintained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 242–244.]

4. SAME—LACHES—FACTS—CONCLUSION.

Complainant had a judgment against T. in 1885 which he could not collect. In January, 1889, two tracts of land were conveyed to S., a sister of T., who in February, 1889, conveyed them to Thomson, who in November, 1895, conveyed them to Mrs. T. and Mrs. C., the wife and daughter of S., respectively. T. died on March 14, 1896, and the deeds were first recorded on March 16, 1896. Complainant brought suit to subject the property to the payment of the judgment more than five years after the deeds were recorded. The statutory limitation was three years after discovery of the fraud. The complainant first discovered in January, 1901, by inquiry among the friends and neighbors of T. that S. was his sister, and by search in the indices of the records, the conveyances in question, and no reason why an earlier discovery was not made, except the pendency of a suit to cancel the judgment, was shown. *Held*:

Complainant failed to establish any sound reason in equity why the doctrine of laches should not be applied in analogy to the statutory limitation, and he could not recover.

Ordinary diligence required him to examine the records in the name of T., at least once in three years, and if he had exercised the same diligence in 1896 or 1897 that he used in 1901, he would have discovered the fraud.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Colorado.

R. T. McNeal, for appellant.

A. C. Phelps, for appellees.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. These suits were brought in September, 1901, to subject two tracts of land, one held by Mrs. Kate E. Brun, who was formerly the wife of Hiram Robert Tillett, and the other by Mrs. Maud Stortes Conklin, who was the daughter of Mrs. Nancy A. Stortes, a sister of Tillett, to the payment of a judgment which the complainant, Jeremiah J. Mann, had recovered against Tillett and one Bloomfield in 1885, upon the ground that Tillett had purchased and paid for these tracts of land and had caused them to be conveyed to the defendants respectively, who were not bona fide purchasers, for the purpose of concealing his property, of preventing the complainant from collecting, and of defrauding him out of his judgment. The majority of the court are of the opinion that the evidence sustained the complainant's charge of fraud, and that he would have been entitled to a decree if he had instituted his suits immediately after

he could have discovered the fraud by the exercise of reasonable diligence, a conclusion to which the writer does not assent.

There is, however, another question which demands decision before the decrees below, which dismissed the bills upon final hearings, can be reversed. It is, was the complainant guilty of laches? The statute of limitations of the state of Colorado provides that bills for relief on the ground of fraud shall be filed within three years after the discovery by the aggrieved party of the facts constituting such fraud, and not afterwards. 2 Mills' Ann. St. § 2911. *Great Western Mining Co. v. Woodmas*, 14 Colo. 90, 98, 23 Pac. 908. This statute bars a suit three years after knowledge of facts which would awaken a person of ordinary prudence to an inquiry, which, if pursued with reasonable diligence, would lead to a discovery of the facts constituting the fraud as effectually as it limits suits commenced three years after the discovery of the facts constituting the fraud. *Swift v. Smith*, 25 C. C. A. 154, 160, 79 Fed. 709, 715; *Pipe v. Smith*, 5 Colo. 146, 149; *Rugan v. Sabin*, 3 C. C. A. 578, 582, 53 Fed. 415, 420.

The national courts, sitting in equity, are not bound by the statutes of limitations of the states, but they apply the doctrine of laches in analogy to them. If a suit discloses no extraordinary facts or circumstances, they apply the bar of laches at the expiration of the time prescribed by the statute of the state for the limitation of an action at law of like character, but if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it. *Kelley v. Boettcher*, 29 C. C. A. 14, 21, 85 Fed. 55, 62. If the complainant invokes the exercise of the judicial discretion of the court to permit the maintenance of his suit after the analogous statutory time has expired, the burden is upon him to show that he has been guilty of no laches. He must specifically plead and prove what the impediments were to the earlier prosecution of his claim, if he was ignorant of the facts alleged in the bill, how he came to be so long without knowledge of them, the means, if any, by which the defendant concealed them, how and when he first came to know them, and such other facts and circumstances as would appeal to the conscience of a chancellor. "And especially must there be distinct averments of the time when the fraud, mistake, and concealment, or misrepresentation was discovered, and how discovered, and what the discovery is, so that the court may clearly see whether, by the exercise of ordinary diligence, the discovery might have been before made. For, if by such diligence the discovery might have been before made, the bill has no foundation on which it can stand in equity, on account of the laches." *Stearns v. Page*, 1 Story, 204, 215, 217, 22 Fed. Cas. 1183, 1187, No. 13,339; *Hardt v. Heidweyer*, 152 U. S. 547, 559, 14 Sup. Ct. 671, 38 L. Ed. 548; *Stearns v. Page*, 7 How. 819, 829, 12 L. Ed. 928; *Badger v. Badger*, 2 Wall. 87, 95, 17 L. Ed. 836; *Wood v. Carpenter*, 101 U. S. 135, 141, 25 L. Ed. 807; *Felix v. Patrick*, 145 U. S. 317, 332,¹ 36 L. Ed. 719; *Foster v. Mansfield & Coldwater, etc., R. R. Co.*, 146 U. S. 88, 100, 13 Sup. Ct. 28.

¹ 12 Sup. Ct. 862.

36 L. Ed. 899; *Johnston v. Standard Mining Co.*, 148 U. S. 360, 370, 13 Sup. Ct. 585, 37 L. Ed. 480.

The facts material to the determination of this question of laches are these: Mann obtained his judgment in 1885, and issued executions upon it from time to time, which were returned nulla bona. The judgment debtors were Tillett and Bloomfield. Bloomfield caused the title to some land which he obtained to be vested in Wm. Thomson, who was an intimate friend of Tillett, and Mann subsequently recovered some of this land from Thomson, and released Bloomfield. In January, 1889, the property here in controversy was conveyed by two deeds from third parties to Mrs. Stortes, the sister of Tillett, and in February, 1889, she conveyed it by two deeds to Wm. Thomson, and died in 1890. On November 16, 1895, Thomson made a deed of one of these tracts to Mrs. Tillett and a deed of the other to Mrs. Conklin, the daughter of Mrs. Stortes. On March 14, 1896, Tillett died. On March 16, 1896, all these deeds which had been withheld from record until that time were recorded in Arapahoe county, Colo. Mann lived in that county, and he supposed that Tillett did. The will of Tillett was executed on November 17, 1895. It named Thomson as its executor, and he qualified and acted as such until April 29, 1897, when he died. Mrs. Tillett was appointed administratrix in September, 1897. She brought a suit in the court below to obtain a satisfaction of Mann's judgment, and that suit was pending in that court and in this until the lower court's decree of a revivor of the judgment was affirmed in this court in 1899. The complainant (Mann) pleaded that he searched the records repeatedly prior to 1896 for conveyances and deeds from Tillett, but that from 1895 until July, 1901, he made no such searches because he was satisfied that any farther search would be in vain, and because the litigation over the judgment was pending; that he first heard of Mrs. Stortes and Mrs. Conklin about July 14, 1901, and then learned by inquiry among the former friends and neighbors of Tillett that Mrs. Stortes was his sister, and that she was impecunious and had lived with, and been supported by, her brother; that he discovered the conveyances to Mrs. Stortes from her to Thomson and from Thomson to Mrs. Tillett and Mrs. Conklin on July 17, 1901, by an examination of the records in the office of the recorder of deeds of Arapahoe county; that he "first searched in the general indices contained in the office of said recorder for conveyances to the said Robert Tillett and in this way discovered the conveyance of certain premises by the said William Thomson to the said Kate E. Tillett."

The complainant testified in regard to his inquiries and efforts to discover this fraud between 1895 and 1901; that early in July, 1901, he learned that Mrs. Stortes was the sister of Tillett; that she owned and was in possession of the tract of land which is now held by Mrs. Conklin; that he then searched the records and found that she held a deed of it and that shortly before, probably three months before, he had searched the records to discover whether or not there was any property standing in the name of Tillett, or that had been conveyed to or by him and had not discovered any; and that he had been laying for Tillett for three or five years before, all the time looking

out to find property. No other reason or excuse for his failure to inquire for and to discover the relation of Mrs. Stortes to Tillett, or the record of the conveyances prior to July, 1901, is pleaded or proved.

The complainant was undoubtedly guilty of no laches previous to March 16, 1896, when the deeds to and from Mrs. Stortes and Thomson were recorded, because prior to that time there was nothing to awaken inquiry concerning them, and no means of securing knowledge of them were within his reach. But the statute of limitations sounded its warning incessantly after, as well as before, the deeds were recorded. It never ceased to cry: Your right to maintain a suit for relief from a fraud is limited to three years after the time when by the use of reasonable diligence a person of ordinary prudence in your situation would have discovered the facts which constitute it. Prior to March, 1896, Mann had repeatedly searched the records for conveyances to and from Tillett, but from February, 1896, until March, 1901, a period of more than five years, he made no search. In July, 1901, he learned by inquiry among the friends and neighbors of Tillett that Mrs. Stortes was his sister, that she was poor and had lived with, and been supported by, her brother, and that she owned and occupied the property now held by Mrs. Conklin. He then searched the records and found the conveyances to and from Mrs. Stortes and Thomson. Mrs. Stortes had then been dead ten years, Tillett more than five years, and Thomson more than four years. A like inquiry among the neighbors and friends of Tillett, and a like search at any time after March, 1896, would undoubtedly have discovered the same facts. The facts and the means of discovery remained the same from March 16, 1896, until July, 1901. On July 17, 1901, he searched the indices of the records of Arapahoe county for conveyances to and from Tillett, and in that way he discovered the deed to Mrs. Tillett and the deeds to Mrs. Stortes and Thomson which preceded that deed in the chain of title. A search of these indices with equal diligence at any time after March 16, 1896, would have disclosed these deeds.

This suit was instituted more than five years after the deeds assailed were spread upon the public records. The statute barred suits for relief against frauds in three years after the discovery of the facts which would awaken a person of reasonable prudence to an inquiry that would lead to their discovery. In the face of this statute, reasonable diligence required that the complainant, who suspected conveyances of real estate would be made or procured by Tillett for the purpose of concealing his property and defrauding his creditors, should examine the public records in his name, which would be likely to disclose and which did disclose such conveyances, at least once in three years. He failed to make this search, and to inquire among Tillett's neighbors and friends so as to ascertain his relationship to Mrs. Stortes, until the statutory time had passed. The burden was upon him in this suit to show some sound reason why he did not make this search and inquiry in less than four years after the means of discovering the fraud were within his reach, and why a court of equity should refuse to apply its doctrine of laches until more than two years after the statutory limitation upon a like action had expired. He did not successfully bear this burden. He failed to establish any reasonable ex-

cuse for his postponement of his inquiry and search for more than four years after these deeds had been recorded. If by a failure to make the search and inquiry after the public record disclosed the means of discovery he could toll the limitation of the statute two years beyond the statutory time, it is not perceived why by a continued failure he might not toll it indefinitely; and as no equitable reason has been shown why the doctrine of laches should not be applied after the expiration of the limitation, the complainant has no standing in equity. He was guilty of laches which bars his suit, and the decrees below must be affirmed.

It is so ordered.

(157 Fed. 195.)

FREEMAN et al. v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. November 6, 1907.)

No. 731.

INTERNAL REVENUE—ACTION ON DISTILLER'S BOND TO RECOVER TAXES—DEFENSES.

Rev. St. § 3221, as amended by Act March 1, 1879, c. 125, § 6, 20 Stat. 341 [U. S. Comp. St. 1901, p. 2087], which provides that when any distilled spirits deposited in warehouse are destroyed by accidental fire or other casualty without fraud, collusion, or negligence of the owner thereof no taxes shall be collected on such spirits, confers on such owner a legal right which is enforceable in the courts, and is not dependent on the discretionary action of the Secretary of the Treasury, and such destruction of spirits in a warehouse by accidental fire may be set up as a defense to an action by the government on a distiller's bond to recover the taxes thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Internal Revenue, § 70.]

In Error to the Circuit Court of the United States for the Western District of North Carolina.

James J. Britt and M. W. Brown, for plaintiffs in error.

A. E. Holton, U. S. Atty.

Before GOFF and PRITCHARD, Circuit Judges, and WADDILL, District Judge.

PRITCHARD, Circuit Judge. This is an action brought by the United States against Authel H. Freeman and the National Surety Company to recover the sum of \$2,302.53, alleged to be due as taxes upon spirits deposited in the distillery warehouse of the said Authel H. Freeman, together with 5 per cent. penalty and interest from the 1st day of January, 1904.

It was admitted that the bonds upon which suit was instituted were executed by Authel H. Freeman, as principal, and National Surety Company, as surety; that the packages of distilled spirits upon which taxes are claimed were manufactured by the said Authel H. Freeman and duly deposited in a bonded warehouse. It was also admitted that the warehouse in question was accidentally destroyed by fire, without fraud, collusion, or negligence on the part of the distiller or his surety. Plaintiff below interposed a demurrer upon the ground that the

answer was insufficient and did not set forth facts sufficient to constitute a legal defense, and judgment was rendered upon the pleadings for the amount claimed to be due.

In considering the merits of this controversy, it becomes necessary to determine whether the court below erred in holding that the answer was insufficient in that it did not "set forth facts sufficient to constitute a legal defense to the cause of action set up in plaintiff's complaint." In other words, are the plaintiffs in error, under the circumstances, entitled in a court of law to assert a right conferred upon the distiller by an act of Congress.

The act of May 27, 1872, c. 218, 17 Stat. 162 [U. S. Comp. St. 1901, p. 2087], contains the following provision:

"The Secretary of the Treasury, upon the production to him of satisfactory proof of the actual destruction by accidental fire or other casualty, and without any fraud, collusion, or negligence of the owner thereof, of any distilled spirits, while the same remained in the custody of any officer of internal revenue in any distillery warehouse, or bonded warehouse of the United States and before the tax thereon has been paid, may abate the amount of internal taxes accruing thereon, and may cancel any warehouse bond, or enter satisfaction thereon, in whole or in part, as the case may be. And if such taxes have been collected since the destruction of such spirits, the said Secretary shall refund the same to the owners thereof out of any moneys in the treasury, not otherwise appropriated." Rev. St. § 3221 [U. S. Comp. St. 1901, p. 2087].

The foregoing section left the determination of the questions to which it related to the Secretary of the Treasury; and it was decided in the case of *Farrell v. United States*, 99 U. S. 221, 25 L. Ed. 321, that the action of the Secretary in pursuance of the authority vested in him by this section was final and conclusive. The Supreme Court in that case held that the determination of the matter rested solely in the discretion of the Secretary of the Treasury, and that there was no remedy afforded the distiller by which he could secure an adjudication by the courts of any rights conferred by the statute, and under these circumstances the amendment to section 3221 [U. S. Comp. St. 1901, p. 2087] was evidently intended to enlarge the statute so as to give the United States courts concurrent jurisdiction in such cases and thus enable such courts to hear and determine any right conferred upon distillers and their sureties.

This amendment was passed March 1, 1879, c. 125, § 6, 20 Stat. 341 [U. S. Comp. St. 1901, p. 2087], and reads as follows:

"And when any distilled spirits are hereafter destroyed by accidental fire or other casualty, without any fraud, collusion, or negligence of the owner thereof, after the time when the same should have been drawn off by the gauger and placed in the distillery warehouse provided by law, no tax shall be collected on such spirits so destroyed, or if collected, it shall be refunded upon the production of satisfactory proof that the spirits were destroyed as herein specified." Rev. St. § 3221 [U. S. Comp. St. 1901, p. 2087].

This provision is embodied as a part of section 3221 of the Revised Statutes [U. S. Comp. St. 1901, p. 2087], and was evidently intended as an amendment of that section.

The law, as it now stands in relation to this subject, may be epitomized as follows: (a) That the Secretary of the Treasury may abate taxes before collection upon the production to him of satisfactory proof; (b) that the Secretary of the Treasury shall refund taxes after col-

lection. The amendment passed in 1879 provides: (a) No tax shall be collected. (b) If collected shall be refunded.

The amendment to section 3221 of the Revised Statutes [U. S. Comp. St. 1901, p. 2087] expressly provides that when any distilled spirits deposited in warehouse are destroyed by accidental fire or other casualty, without fraud, collusion, or negligence of the owner thereof, that no taxes shall be collected on such spirits so destroyed, etc. This provision clearly confers upon a distiller a right, and that right is that in all cases where spirits are destroyed by accidental fire or other casualty, etc., that no taxes shall be collected on the spirits thus destroyed.

The government seeks to obtain a judgment against the distiller and his surety, and invokes the aid of the United States court for that purpose. It institutes a suit upon a bond which was executed by the distiller and his surety for the payment of any taxes that might be due by the distiller; and while the execution of the bond by the distiller and his surety is admitted, nevertheless it is still incumbent on the government to show that the distiller is indebted to the government for the amount claimed to be due for taxes on distilled spirits. Thus we have a well-defined issue as to whether the distiller is indebted to the government for taxes on distilled spirits. However, it is insisted by counsel for the government that the court is powerless to hear any evidence which the defendants may offer in relation to the issue thus raised. The distiller and his surety contend that the distiller is not indebted to the government, and in support of such contention it is averred that the spirits deposited in the warehouse were accidentally destroyed by fire, without any fraud, collusion, or negligence of the defendants. This is as complete a defense to the action, when proven or admitted, as the plea of payment could possibly be when proven or admitted. The statute expressly provides that no tax on spirits destroyed in this manner shall be collected. To hold that the distiller and his surety under such circumstances would not be entitled to assert a right thus conferred as a defense to such an action would be in utter disregard of the rights of the defendants below and would deprive them of their property without due process of law, as well as to deny them the equal protection of the laws.

It is admitted by counsel for the government that the spirits in question were accidentally destroyed by fire without any fraud, collusion, or negligence of the plaintiffs in error, and that the law (Act March 1, 1879) provides that no tax shall be collected on such spirits so destroyed, but it is insisted that notwithstanding that the plaintiffs in error are by law invested with the right thus conferred, that the court is powerless to afford a remedy. We cannot see our way clear to give our assent to this construction of the statute.

Blackstone, in discussing this phase of the question, after referring to two classes of cases where a remedy is afforded by mere operation of law, says:

"In all other cases it is a general and indispensable rule that where there is a legal right there is also a legal remedy by suit, or action at law, whenever that right is invaded."

In legal parlance, to refer to one as having a right, presupposes the existence of a remedy. It would be inconsistent for Congress to un-

dertake to confer a right without affording a remedy, and in this instance there is no doubt as to the nature of the right which was intended to be conferred upon the distiller. The statute is positive and unequivocal in relation to the subject with which it deals, and when construed in accordance with the well-defined rules of construction it is in the nature of an exemption; and in cases where it can be shown that the spirits were destroyed under the circumstances alleged in the answer, the facts set forth therein, when proven (or admitted as in this instance), the defense is as complete and effectual as where the statute of limitations is relied upon. It is provided that under such circumstances the distiller shall not be required to pay the government any tax, and the exemption of the payment of taxes contemplated by this section inures to the benefit of the surety as well as the distiller, inasmuch as the surety stands in the shoes of the distiller, and it necessarily follows that any right conferred upon, or any exemption in favor of, the distiller, can be taken advantage of by the surety and pleaded as a defense to an action of this character. The institution of this action against the surety clearly raises an issue as to whether the surety has become liable on the warehouse bond of the distiller for any taxes that may be due by the distiller to the government. The provisions of the bond are such that the surety undertakes to guarantee the payment of any and all taxes that may be due the government on packages of spirits deposited in the warehouse during a certain period of time. Were it not for the act of Congress authorizing the establishment of bonded warehouses, and the provision that the distiller should have eight years in which to pay the taxes on spirits duly deposited therein, as in this instance, the taxes would at once become due and payable. However, Congress has in its wisdom seen fit to afford this extension of time to distillers, and one who becomes surety under such circumstances sustains the same relation to the government that a surety would to an individual when he undertakes to answer for the default or miscarriage of another, and were it not for the provisions contained in section 3221 of the Revised Statutes [U. S. Comp. St. 1901, p. 2087] the surety would be liable for the full amount of the undertaking, notwithstanding any accident or casualty which might befall his principal in the meantime. The basis of the right of the government to recover against the surety depends upon its ability to show that it is entitled to recover the amount alleged to be due against the principal. The government has, in this instance, sought to collect the amount of taxes alleged to be due in a court of law, and in order to do so has instituted proceedings for that purpose. Under these circumstances it would be unprecedented to hold that, notwithstanding certain rights were conferred upon the distiller by the provisions of the statute, yet the surety, when sued on his joint obligation with the distiller, should not be entitled to assert this right as a defense to the action instituted against him. In the case of the *United States v. Bank of America* (C. C.) 15 Fed. 730, among other things, it is said:

"When the government elects to resort to the aid of the court, it must abide by the legality of the tax." *Clinkenbeard v. United States*, 21 Wall. 65, 22 L. Ed. 477; *United States v. Myers*, 3 Hughes, 239, Fed. Cas. No. 15,846.

While under the revenue laws taxes are due the government by the distiller on distilled spirits as soon as the same are produced, and there is ample machinery for collecting the same by warrant of distraint without the government being required to secure a judgment against the distiller, yet this provision of the law only applies to the distiller in cases where the spirits have not been placed in a bonded warehouse as hereinbefore stated; but before the government can collect any taxes from the surety that might be due by the distiller it must first obtain a judgment against the distiller as well as the surety, and when an action is instituted for that purpose it necessarily raises an issue as to whether the distiller is due the government anything, and this issue must be determined in favor of the government before a judgment can be obtained against either. Therefore the surety from the very nature of the suit would be entitled to show by way of defense anything which would relieve him from a compliance with the obligation which he had assumed, and it is expressly provided by the statute that under certain conditions, which if shown to exist (or admitted, as in this instance) to wit, that the spirits were destroyed by accidental fire or other casualty, without fraud, collusion, or negligence on the part of the distiller, no taxes shall be collected on such spirits, it would undoubtedly be competent for the surety to plead such matters as a bar to the right of recovery.

For the reasons herein stated, we are of the opinion that the learned judge below erred in sustaining the demurrer filed by the defendant in error. The judgment of the circuit court is therefore reversed, and the case will be remanded, with instructions to proceed with the same in accordance with the views herein expressed.

Reversed.

(157 Fed. 199.)

KIMBER v. YOUNG.

(Circuit Court of Appeals, Eighth Circuit. November 5, 1907.)

No. 2,520.

1. FRAUD—ACTION FOR DECEIT—GROUNDS.

An action for fraud and deceit must be predicated on existing facts and not of matters possible to arise, and the plaintiff's pleading must allege that the representations were false and that plaintiff was misled thereby to his injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 37, 40, 41.]

2. SAME—FALSE REPRESENTATIONS—NATURE.

Allegations in the complaint in an action for fraud and deceit that plaintiff was induced to buy certain bonds of a corporation by false representations are not supported by a letter, written by defendant to plaintiff, in which he gave her the numbers of the bonds to be sold, stated that the bond issue was arranged so that one-tenth would fall due each year and the maturity of each bond was stated on its face, that the bonds offered came in before those owned by defendant and his associates, and that, "Indeed, you may be said to hold the preferred place on the list"; the only representation made which could in any event be actionable being that as to the preferential character of the bonds offered, which, construed in the light of the other statements, clearly meant no more than that they matured before those bearing higher numbers in the series, and

which was not shown to be untrue, there being no allegation in respect to any bonds owned by defendant and his associates.

3. SAME—CONSTRUCTION OF WRITING.

Where no other means were employed to induce a plaintiff to accept a proposition for a sale of bonds than the language contained in a writing, plaintiff cannot be heard to say that, because of his or her inaptness in comprehending on examination the ordinary import and common acceptance of the terms employed, they must be made to mean more or other than what they express.

4. SAME—EVIDENCE—RELEVANCY TO ISSUES.

Where the complaint in an action for fraud and deceit alleged that the representations made were in writing and made to plaintiff, oral statements made by defendant to a third person are not admissible in support of such complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 44, 45.]

In Error to the Circuit Court of the United States for the District of Colorado.

C. S. Thomas (W. H. Bryant and William P. Malburn, on the brief), for plaintiff in error.

Daniel Sayer, for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. The substance of the petition in this case appears in the statement of facts made in *Kimber v. Young*, 137 Fed. 745, 70 C. C. A. 178, when this case was before this court on writ of error to review the judgment of the Circuit Court in sustaining a demurrer to the petition. After the case was remanded to the Circuit Court, with directions to overrule the demurrer to the first count and to permit the defendant to answer, he made answer putting in issue the material allegations of the petition respecting the charges of fraud and deceit. On trial to a jury at the close of the plaintiff's evidence the court directed a verdict for the defendant. To have this action of the court reviewed the plaintiff brought the case here on writ of error.

In respect of the false representations alleged in the first count of the petition to have been made by the defendant, Judge Hook, who wrote the majority opinion of the court in the case, *supra*, said:

"It is also charged that defendant represented that other persons had agreed to accept some of the bonds in part payment of mining property sold by them to the company, that the bonds offered to the plaintiff would come in before those held by defendant and his associates, and that as to such bonds she would occupy a preferred place among the bondholders. These representations were material, and were well calculated to induce the plaintiff to accept the bonds. There is no reference in the complaint to any recitals of the bonds themselves which would impugn her averment that, aside from the misrepresentations of defendant, she was wholly without knowledge or means of acquiring the same. In respect of these representations a cause of action is stated in the first count of the complaint, and the demurrer thereto should have been overruled. But it should be said that if, upon the trial, it is found that the alleged representation of priority of the plaintiff's bonds was merely that they would be paid at maturity, and would therefore be out of the way before those succeeding installments would mature—a priority in time of payment rather than of lien or obligation—it would be merely promissory in character, and not actionable."

If the facts developed on the trial are, in legal effect, the same as charged in the petition, the ruling of this court on the demurrer would be the law of the case made. The portion of the petition so construed is as follows:

"That the said bonds offered to this plaintiff were due absolutely July 1, 1901, and that the bonds offered to plaintiff would come in before those of the defendant and his associates, that plaintiff would hold a preferred place on the list, that plaintiff might depend upon the coupons being promptly met, and that she would be honorably dealt with in every respect. That the said defendant further stated and represented * * * that he knew the bonds offered to the plaintiff to be good," etc.

The petition counted on written statements claimed to have been made to her by the defendant. The proof at the trial rested upon a letter written by the defendant, of date June 27, 1899, the material statement of which pertaining to the question now to be decided is as follows:

"I gave Ben a sample bond to send you, and explained to him fully all about the security. The bond issue is arranged so that one-tenth of the whole falls due each year, and the maturity of each bond is stated on its face. This is all in the hands of the trust company, and the provisions and recitals of all the bonds must be met, whether we will or not. The numbers of the bonds given Ben are No. 114 to No. 150, both inclusive, and they are all two-year bonds, due absolutely July 1, 1901, while we have the option of paying them before that date, should we be in shape to do so. Whatever bonds I or my associates (who put up the money) hold come in after yours. Indeed, you may be said to hold the preferred place on the list. The coupons on these (due 1st January and 1st July), you may depend upon it, will be promptly met, and you will be honorably dealt with in every respect."

It is thus manifested that the proof is materially different from the version given in the petition. The plaintiff was distinctly advised by this letter that the bonds issued were arranged so that one-tenth of the whole would fall due each year, and that the maturing period was stated on their face. She was further advised that all this (the bonds we presume) was in the hands of the trust company, and that the conditions as expressed on the face of the bonds would have to be met, *nolens volens*. This was coupled with the information that the bonds the plaintiff would get were numbered from 114 to 150, inclusive, and that they would mature absolutely July 1, 1901. Thus she was advised that in their numerical order there were 113 bonds preceding hers, the time of the maturity of which appeared on their face. She was, therefore, further advised that there was nothing on the face of the bonds indicating that they were preferential in character over the antecedent numbers. Of the statement that "whatever bonds I or my associates (who put up the money) hold come in after yours" it is sufficient to say that there is no allegation in the petition that in fact the defendant and his associates held any such bonds; nor is it alleged that the statement, if it had been in its terms an affirmation of the fact, was in fact false, followed with the appropriate *ad damnum* clause. Concededly this action is one for fraud and deceit. As such it must be predicated upon existing facts, and not of matters possibly to arise. The representation made must be alleged to have been false, and that the party to whom it was made was misled thereby, to her injury. "Relief can no more be administered upon facts proved

but not alleged than upon facts alleged but not proved." *Phelps v. Elliott* (C. C.) 35 Fed. 461; *Newham v. Kenton*, 79 Mo. 382-385; *Harrison v. Nixon*, 9 Pet. 503, 9 L. Ed. 201; *Boone v. Chiles*, 10 Pet. 209, 9 L. Ed. 388; *Reed v. Bott*, 100 Mo. 66, 12 S. W. 347, 14 S. W. 1089; *Hoester v. Sammelmann*, 101 Mo. 619, 14 S. W. 728; *Cella v. Brown*, 144 Fed. 754, 75 C. C. A. 608.

The plaintiff's ground of relief is, therefore, reduced to the statement contained in the letter that "indeed, you may be said to hold the preferred place on the list." Taken in its connection, can this be held to amount in law to a positive, or even implied, assurance that the bonds from 114 to 150 were preferential in character? It is apparent from her testimony that the plaintiff is a woman of unusual intelligence, keenly appreciative of the import of business terms, and that she was especially alive in giving her testimony to keep prominent the essential qualities of a cause based on fraudulent representations and deceit. Clearly enough the statement last above quoted, taken in its connection, amounted to nothing more than the expression of a mere opinion, drawn from the data furnished the plaintiff in the letter, that it might be said she would hold the preferential place on the list. She was plainly enough advised, by the terms of the bonds, that they were a part of a series maturing at given dates, all of which would have to be paid according to the "letter of the bond." Inasmuch as they were expected to be paid as they matured, she would hold the preferential place as to after-maturing bonds, for her bonds would be paid before succeeding installments would become due.

No one can be heard to say that, because of his or her inaptness in comprehending on examination the ordinary import and common acceptance of the terms employed in a written proposal, they must be made to mean more or other than what they express. This must be so held where no other means were employed to induce the acceptance of the proposition than the language contained in the writing. The petition does not even aver that the plaintiff's bonds were not preferential as to other bonds, whereby damage resulted to her. The averment in this respect is simply that when the bonds matured and were presented payment was refused, whereupon she instituted an action in the proper court for the collection of the same against the company, which resisted payment through the defendant acting in its behalf; that the bonds had not only been dishonored by the company, but they were in fact at maturity of no value; and that she was unable to collect the same or any part thereof. The proof at the trial showed that when the bonds matured she did bring action and obtained judgment, but had been unable to collect the same because of the insolvency of the company. Resort to an action against the defendant, predicated upon fraud and deceit, would seem to be an afterthought. Unless her failure to collect resulted from the fact that the defendant represented in the letter that she "may be said to hold the preferred place on the list," this statement is quite immaterial. As already suggested, our conclusion is that the reasonable and natural construction to be placed upon the letter is that the representation as to priority of the plaintiff's bonds amounted to nothing more than that they would be paid promptly at

maturity and be out of the way before succeeding installments became due.

Error is assigned of the action of the court in excluding the statement, made in the deposition of Ben Kimber, to the effect that in his conversation with the defendant, who sought his assistance in inducing his mother, the plaintiff, to accept the bonds, he stated, in effect, that the bonds were perfectly good, and in all probability they would be taken up within three or four months. In the first place, the petition throughout alleges that the representations made to her by the defendant were in writing, and as above stated these representations were predicated of said letter written to her by the defendant. This did not admit of oral statements which the defendant may have made to a third party. Both he and his mother disclaimed in their depositions that he was acting as agent for her in the transaction. Furthermore, their testimony does not claim that said alleged statement was communicated to her before she accepted the bonds. And, even if the statement had been communicated to her, it would not constitute a proper predicate for the action of fraud and deceit under the first count of the petition. If it amounted to anything, it would only be of the character of a warranty, on which the second count of the petition was based, which was held by this court, when the case was here on demurrer, to be an insufficient ground of action.

It results that the judgment of the Circuit Court must be affirmed.

(157 Fed. 203.)

WEBB v. AMERICAN ASPHALTUM MINING CO.

(Circuit Court of Appeals, Eighth Circuit. November 16, 1907.)

No. 2,651.

1. MINES AND MINERALS—MINING CLAIMS—PUBLIC LANDS—ASPHALTUM IN VEINS LOCATABLE BY LODE CLAIMS, BUT NOT BY PLACER CLAIMS.

Asphaltum in lodes or veins in rock in place may be entered and patented by means of lode mining claims under section 2320, Rev. St. [U. S. Comp. St. 1901, p. 1424], and it may not be secured by means of placer claims under section 2329, nor under Act Feb. 11, 1897, c. 216, 29 Stat. 526 [U. S. Comp. St. 1901, p. 1434], regarding the entry of lands containing petroleum or other mineral oils.

2. SAME—LODE AND PLACER CLAIMS—DISTINGUISHING TEST, FORM OR CHARACTER OF DEPOSITS—WHETHER IN LODS OR NOT.

The distinguishing test which determines whether or not a valuable mineral deposit may be secured by a lode claim or by a placer claim is the form and character of the deposit. If it is in a vein or lode in rock in place, it may be secured by a lode claim, and it may not be by a placer claim. If it is not in a vein or lode in rock in place, it may be secured by a placer claim, and may not be by a lode claim.

3. SAME—CONSTRUCTION—"OTHER VALUABLE DEPOSITS" IN SECTION 2320, REVISED STATUTES. INCLUDES NONMETALLIFEROUS DEPOSITS.

The words "other valuable deposits" in the clause "mining claims upon veins or lodes of quartz, or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits" in section 2320, Rev. St. [U. S. Comp. St. 1901, p. 1421], includes nonmetalliferous, as well as metalliferous, deposits.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Colorado.

J. M. Woy (A. L. Abrahams, on the brief), for plaintiff in error.

J. E. Robinson (Edward D. Upham, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. This action involves the title and the right of possession of a lode or vein of asphaltum of the kind commonly called "gilsonite," upon which the grantors of the plaintiff, Webb, located a placer claim, and the grantor of the defendant, the American Asphaltum Mining Company, subsequently located two lode mining claims. The defendant applied for a patent, the plaintiff filed an adverse claim, and brought this action to determine the title. The case was tried by the court upon an agreed statement of facts and some extraneous testimony, and the court found for the defendant. The latter's objection to the consideration of the question whether or not this finding is sustained by the evidence would be well founded, were it not for the fact that the agreed statement discloses all the material facts, and the evidence which was taken was immaterial. Hence the issue of law arises in this court whether or not the agreed facts sustained the judgment, and that issue is dependent upon the true answer to the single question: May the right to the possession and to the title to a vein or lode of asphaltum in rock in place be secured by the location of a placer claim upon the land in which it is found?

A vein or lode is mineral-bearing rock or other earthy matter in place in a fissure in rock, so that its boundaries are sharply defined by rocky walls in place. A lode location is the location of such a lode or vein in the manner prescribed by the acts of Congress. A placer location is the location in accordance with those acts of a tract of land for the mineral bearing or other valuable deposits upon or within it that are not found in lodes or veins in rock in place. It is a claim of a tract of land for the sake of loose deposits on or near its surface. *Clipper Mining Company v. Eli Mining & Land Company*, 194 U. S. 220, 228, 24 Sup. Ct. 632, 48 L. Ed. 944. The plaintiff in this case has made no claim of right or title under section 2333 of the Revised Statutes [U. S. Comp. St. 1901, p. 1433], and the statements and discussion herein have no relevancy to such a claim or to the proper construction of that section. By section 2319 of the Revised Statutes all valuable mineral deposits in lands belonging to the United States are declared to be free and open to exploration and purchase. By the second section of the act of July 26, 1866 (14 Stat. c. 262), the location and acquisition by means of a lode mining claim of any "vein or lode of quartz, or other rock in place bearing gold, silver, cinnabar, or copper" were authorized. By Act July 9, 1870, c. 235, 16 Stat. 217, Rev. St. § 2329, the act of 1866 was amended by adding section 12, which provided "that claims, usually called 'placers' including all forms of deposit, excepting veins of quartz or other rock in place" might be entered and patented. By the act of May 10, 1872, section

2 of the act of 1866 was repealed and authority was granted to qualified citizens to locate and acquire by means of lode mining claims "veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits." Act May 10, 1872, c. 152, §§ 2, 9, 17 Stat. 91, 94, Rev. St. § 2320.

The asphaltum here in controversy is a solid valuable mineral deposit commonly called "gilsonite," which is found in a vein or lode in rock in place. But counsel for the plaintiff insist that it is not subject to location as a lode because it is not a metalliferous deposit. They say that while it falls within the literal meaning of the words "other valuable deposits" in section 2320, those words should be interpreted by the rules *noscitur a sociis* and *eiusdem generis*, and that, as all the deposits specified in that section bear metal, the intention of Congress must be presumed to have been to restrict the meaning of that term to deposits of the same kind. The rules that, where general words follow specific words, the former are presumed to treat of things of the same character as the latter, and that words and terms should receive the interpretation which the same or similar terms must have in the same or like relations, are persuasive, and the argument founded upon them might have proved convincing if other considerations could have been ignored. But the term "other valuable deposits" occurs in a general statute enacted to provide a comprehensive and complete system for the disposition of the mineral deposits in the lands of the United States. Separate sections or clauses of this general legislation may not be lawfully segregated from the body of the statutes upon this subject and interpreted without reference to the purpose and general effect of the other laws relating thereto, but all the parts of this legislation must be considered and construed together, to the end that, if possible, it may become and be a uniform and practical system of regulation and of action.

Section 2318 provides that all "lands valuable for minerals" shall be reserved from sale, except as otherwise expressly directed. Section 2319 declares that "all mineral deposits in lands" belonging to the United States shall be open to exploration and purchase. Section 2320 specifies the method by which "veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits" may be secured, and section 2329 provides that "claims for placers including all forms of deposit, excepting veins of quartz or other rock in place may be entered and patented." The "mineral deposits" treated in this legislation include nonmetalliferous deposits, alum, asphaltum, borax, guano, diamonds, gypsum, resin, marble, mica, slate, amber, petroleum, limestone, and building stone, as well as deposits bearing gold, silver, and other metals, and the term "lands valuable for minerals" in the law means all lands chiefly valuable for any of these mineral deposits rather than for agricultural purposes. *Northern Pacific Ry. Co. v. Soderberg*, 188 U. S. 526, 534-537, 23 Sup. Ct. 365, 47 L. Ed. 575; *Pacific Coast Marble Co. v. Northern Pacific R. R. Co.*, 25 Land Dec. Dep. Int. 233, 240. Thus it clearly appears that the plan of this legislation was to provide two general methods of purchasing mineral deposits from the United States

—one by lode mining claims where the valuable deposits sought were in lodes or veins in rock in place, and the other by placer mining claims where the deposits were not in veins or lodes in rock in place, but were loose, scattered, or disseminated upon or under the surface of the land. The test which Congress provided by this legislation to be applied to determine how these deposits should be secured was the form and character of the deposits. If they are in veins or lodes in rock in place, they may be located and purchased under this legislation by means of lode mining claims; if they are not in fissures in rock in place but are loose or scattered on or through the land they may be located and bought by the use of placer mining claims. *Reynolds v. Iron Silver Mining Co.*, 116 U. S. 687, 695, 6 Sup. Ct. 601, 29 L. Ed. 774; *Clipper Mining Co. v. Eli Mining & Land Co.*, 194 U. S. 220, 228, 24 Sup. Ct. 632, 48 L. Ed. 944.

The maxims, *noscitur a sociis* and *ejusdem generis*, are but aids to discover the true intention of the legislative body, not arbitrary rules to be used to thwart its purpose, and they may not be permitted to prevail where the words of the statute and the entire act in which they appear, or the entire body of legislation which constitutes the legislative scheme upon the subject, clearly show that the application of these rules would have the latter effect. The words "other valuable deposits," in section 2320, taken in their common signification, include gilsonite and the other solid forms of asphaltum, for these are valuable mineral deposits; the body of legislation, of which section 2320 and this term are a part, treats of non-metalliferous as well as metalliferous deposits, and gilsonite or hard asphaltum in a vein or lode in rock in place is one of the valuable deposits upon which a lode mining claim may be lawfully located under this section.

In 1897, however, Congress enacted "that any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims" (Act Feb. 11, 1897, c. 216, 29 Stat. 526 [U. S. Comp. St. 1901, p. 1434]); and counsel for the plaintiff contend that gilsonite and the other forms of asphaltum are mineral oils and may be purchased from the government under this statute by locating placer claims upon the land in which they are found. Asphaltum varies in its consistency from a liquid or semiliquid to a hard or solid condition. The deposit here under consideration is gilsonite, and it is neither a liquid nor a semiliquid, but a hard solid substance. Conceding that this and other solid forms of asphaltum may fall within the scientific and the true significance of the term mineral oils used in this act of 1897, they would not in our opinion fall within the meaning which that term would convey to the mind of a citizen of ordinary intelligence. To such a man the words convey a description of a fluid, and not of a solid substance. The act of 1897 was not enacted for scientists or for those specially learned in the composition and analysis of geological formations alone or chiefly, but for citizens of common intelligence and learning who might

desire to buy valuable deposits upon the lands of the United States and to them the significance of these words "other mineral oils" in this law, following, as they do, the word "petroleum," which describes a liquid, is liquid or semiliquid mineral oils, and it does not include gilsonite or the hard forms of asphaltum. The sense in which the reader of ordinary knowledge and intelligence would take these words, the obvious common meaning of them, should be preferred to the recondite signification which would include the solid forms of asphaltum, and for this reason the act of 1897 did not authorize the entry of lands which contain these deposits by means of placer claims.

Again, a deposit of asphaltum in a lode or vein in rock in place was locatable, as we have seen, by means of a lode mining claim, and it was not subject to location by a placer claim under the acts of 1866 and 1872, when the act of February 11, 1897, was passed. Prior to August 27, 1896, the officers of the land department had held that lands valuable for petroleum might be entered and patented by means of placer claims (*In re Rogers*, 4 Land Dec. Dep. Int. 284; *In re Piru Oil Company*, 16 Land Dec. 117; *Gird v. California Oil Company* [C. C.] 60 Fed. 531), but on that day the Secretary of the Interior decided that they could not be thus located. *Union Oil Company*, 23 Land Dec. Dep. Int. 222. The nature of the act of 1897 and the fact that it was passed at the next session of Congress after this decision strongly indicate that it was not the intention of that body to change thereby the prescribed method for the entry of veins of asphaltum in rock in place, but that its only purpose and the only effect of the act were to restore the rule and practice regarding petroleum and other mineral oils which were not found in veins or lodes which had prevailed before the decision in the *Union Oil Company Case*, so as to authorize the entry of lands which contain them by placer claims.

Our conclusion is that gilsonite and the harder forms of asphaltum in veins or lodes in rock in place may be entered and patented by means of the location of lode mining claims thereon, and that they may not be secured by means of placer claims upon the land in which they are found.

This was the judgment of the court below; and it is affirmed.

(157 Fed. 208.)

**MERCHANTS' & MANUFACTURERS' NAT. BANK OF COLUMBUS,
OHIO, v. GALBRAITH.**

(Circuit Court of Appeals, Sixth Circuit. November 27, 1907.)

No. 1,661.

BANKRUPTCY—PROVABLE CLAIMS—ACCOMMODATION NOTE.

A bankrupt who conducted a private bank gave permission to the president of a national bank who had no account with the bankrupt to draw checks on his bank to the amount of \$25,000. These checks, by an arrangement between the two banks, were cleared through the clearing house by the national bank, which charged them to the bankrupt and credited them to the account of its president. Later the bankrupt gave his note for the amount and the president of the national bank gave to the bankrupt a corresponding note. *Held*, on the evidence, that the transaction was one for the accommodation of the president of the national bank individually, and not of his bank, and the latter was therefore entitled to prove its note against the bankrupt estate.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

N. W. McCoy, for appellant.

Before LURTON and SEVERENS, Circuit Judges.

LURTON, Circuit Judge. This is an appeal from a judgment disallowing a claim against the bankrupt. The claim presented by the appellant was based upon a contract in these words:

"Columbus, Ohio, January 20, 1902.

"On demand after date, for value received, we jointly and severally promise to pay the Merchants' & Manufacturers' National Bank, of Columbus, or order, twenty-five thousand dollars, at its banking house in Columbus, O., with interest after date at the rate of 6 per cent. per annum until paid.

"Milton W. Strait.

"Credits:

"Int. pd. to April 30, 1902.

"Int. pd. to Oct. 31, 1902.

"Int. pd. to Apl. 30, 1903.

"Int. pd. to Oct. 31, 1903.

"Int. pd. to Apl. 30, 1904.

"Int. pd. to Oct. 31, 1904."

The defense against it was that it was accommodation paper made for the accommodation of the Merchants' & Manufacturers' National Bank, the creditor, now the appellant. Both the referee and district judge disallowed the claim as based upon no consideration, although the evidence in behalf of the bank was materially strengthened after the referee's ruling. The bankrupt, Milton W. Strait, carried on a small banking business at Columbus, Ohio, under the name of the "Franklin County Bank." This bank was not a member of the Clearing House Association of Columbus. The appealing creditor was a national bank doing business in the same city and was a member of the Clearing House Association. The latter bank by agreement undertook to "clear" checks drawn against Strait's bank, and had done so for a considerable time prior to the events now to be detailed. During the year 1903, William D. Park was the president of the national

bank and was regarded as a man of some means. Park and Strait were intimates. Strait was likewise a man of financial standing. Between September 8, 1900, and January 26, 1901, Park drew his three individual checks against the Franklin County Bank, aggregating \$25,000. These checks with their indorsements were as follows:

Ex. A-1. Columbus, Ohio, Sep. 8, 1900.
 No. Ex. B. Ex. A-1. O. K. G.
 { 2 c Internal Revenue }
 { Documentary Stamp. }
 Franklin County Bank.
 Pay to M. W. Strait, or order.
 Five thousandDollars
 \$5,000.00. W. D. Park.
 Counter Check.

Ex. A-2. Columbus, Ohio, 1-15-1900.
 No. Ex. C. Ex. A-2. O. K. G.
 { 2 c Internal Revenue }
 { Documentary Stamp. }
 Franklin County Bank.
 Pay to W. D. Park, or order,
 Ten thousandDollars.
 \$10,000.00. W. D. Park.
 Counter Check.

Indorsed:
 Pay to the order of any Bank or Banker, Merchants' and Mfrs.' National Bank, Columbus, Ohio.
 Howard C. Park, Cashier.

Ex. A-3. Columbus, Ohio, Jany., 26, 1901.
 No. Ex. D. Ex. A-3. O. K. G.
 { 2 c Internal Revenue }
 { Documentary Stamp. }
 Franklin County Bank.
 Pay to H. C. Park, Cas. or bearer,
 Ten thousandDollars.
 \$10,000.00. W. D. Park.
 Counter Check.

Indorsed:
 Pay to the order of any Bank or Banker, Merchants' and Mfrs.' National Bank, Columbus, Ohio. Howard C. Park, Cashier.

These checks were "cleared" by the Merchants' & Manufacturers' Bank, and the Franklin Bank became thereby debtor to the Merchants' & Manufacturers' Bank. Park had no account with the Franklin Bank, but drew the checks with the express consent of Strait. Strait's own story about the first of these checks was that:

"Mr. Park telephoned me for permission to clear a check of \$5,000 on us for a few days and I told him he could."

The same telephonic request was made for permission "to clear" the two subsequent checks for \$10,000 each. The plain import of the authority given to Park was that he might individually draw these several checks and that they would be paid in the usual course of clearing house business, however used by him. Were these checks drawn for the accommodation of Park individually or of the Merchants' &

Manufacturers' Bank? The court below reached the conclusion that they were in fact "a bank transaction for the purpose of creating a fictitious asset intended to deceive the bank examiner, and that the note was substituted for the checks merely for the purpose of presenting it in better form than an overdraft." That the checks were used for the personal account of the drawer, William D. Park, is indisputably true. He testified that they were credited to one or the other of several deposit accounts with the Merchants' & Manufacturers' Bank standing in his name, either personally or as a fiduciary, and that he personally received the entire benefit. Strait does not deny this. He could not. He could know nothing about the actual use made of them by Park. That Park did not remember to which of his accounts they were credited is not strange. He testified some six years after the transaction. The books of the bank do not distinguish between deposits of money and checks. The deposit slips which would show this could not be found by the receiver. The books of the Merchants' & Manufacturers' Bank do, however, show that these checks were regularly charged up to the account of the Franklin Bank.

It is further shown that these checks as they were severally "cleared" were returned to the Franklin Bank along with other checks likewise cleared in ordinary course of business. The checks, when returned, were accompanied by the usual clearing house slips containing a list of checks cleared that day by the Merchants' & Manufacturers' Bank for the Franklin Bank. The checks and these slips were duly received by Strait, and both have been produced in evidence by him. The memorandum slips included these checks, and undoubtedly informed Strait that the checks had been paid or "cleared" by the Merchants' & Manufacturers' Bank in the usual course of clearing house business. The result of the transactions was to leave the Franklin Bank debtor to the Merchants' & Manufacturers' Bank to the amount of the checks. That fact accordingly appears on the books of that bank, and the account stood overdrawn until settled by the execution of Strait's note, the one here involved. Another consequence was that Park stood debtor to the Franklin Bank in the sum of \$25,000. He had no deposit account in that bank, and the checks themselves were the only evidence of his indebtedness. This indebtedness stood in that shape until Park gave his note for \$25,000 to the Franklin Bank, attaching these three checks to the same, with the memorandum styling them "collateral." Park's note is as follows:

No. 2,301.

Due 1-21-02.

\$25,000.00

Columbus, Ohio, Jany. 20, 1901.

On demand after date, for value received we jointly and severally promise to pay Franklin County Bank, or order, twenty-five thousand Dollars, at the Merchants' & Manufacturers' National Bank, of Columbus, in Columbus, Ohio, with interest after date at the rate of 6 per cent. per annum until paid.

2 cks of 10 M each

W. D. Park.

1 cks of 5 M each.

This note and the note of Strait are for identical sums and bear same date. Manifestly these facts plainly indicate that these checks were for the personal accommodation of Park and confirm his posi-

tive evidence to that effect. The Merchants' & Manufacturers' Bank indisputably paid these checks and stand to lose the whole sum, unless the payment of the checks by it constitute the consideration for the note in suit. Obviously Strait's note was made to close the overdrawn account of the Franklin Bank, as testified by Park. That his note was given for a corresponding sum to close his indebtedness to the Franklin Bank, as testified by him, is corroborated by the appearance of the transaction on its face. Against his positive testimony, and the inference to be drawn from the transaction as indicated by the checks and notes, is the very indefinite story of the bankrupt, Strait, that he made the note in suit only at the request of Park, and that Park made his note of like amount at the same time as an "indemnity" to protect against its payment. Recurring to Strait's account of the making of his note, it is to be observed that he is disingenuous in his history of the matter. He seems to wish the note to be regarded as a thing having no relation to the checks he had given Park permission to draw, and yet he does not say so. He does not profess to say what either he or Park said about the matter. Though much pressed to state the conversation which induced the making of the note in suit, he contents himself with saying that "it was given to put the accommodation in different form." This is, as we can but read it, an admission that the note was given to square the overdrawn account of the Franklin Bank, a bank entirely owned by himself. He nowhere denies that the note was given to close the overdrawn account of the Franklin Bank. That the Merchants' & Manufacturers' Bank wished this overdrawn account to be closed is undoubtedly true. That is what Park, its president at the time, says was his motive in asking for the note. In a sense this was an "accommodation" to the bank, for it put the indebtedness of the Franklin Bank in better shape to pass the inspection of the bank examiner. But that the overdrawn account of the Franklin Bank, the private bank of Strait, was the consideration for the note, Strait does not deny, and the question of consideration for the note must turn upon whether Park was individually given credit by the Merchants' & Manufacturers' Bank by a deposit of the checks to some one of his accounts. That Strait should wish Park to pay the checks he had drawn against the Franklin Bank, checks which had been paid by the Merchants' & Manufacturers' Bank, is just what we should expect. Accordingly we find Park saying that Strait pressed him to take up these checks, as he needed the money. Being unable to do this, he proposed that the Franklin's overdrawn account should be settled by Strait's note, thereby giving him or his bank the further credit which would come from the closing of an overdraft and relieve him from any immediate demand for the money. As a part of the arrangement he gave his own note for his own debt by reason of his checks on Strait's bank. Interest payments were credited on this Park note corresponding to those credited upon Strait's note. The evidence of both Park and Strait agrees substantially that Park himself paid the interest on Strait's note, and that in consequence of this corresponding credits were placed on Park's note; the consideration for the one credit being the credit on the other note. Upon the whole evidence we cannot escape the conclusion that Park was the accommodated party, and that

the note in suit rests upon the consideration of the credit given to him by these checks in one or the other of his deposit accounts.

The judgment disallowing the claim must be reversed, and the case remanded, with directions to allow the claim. The costs will be paid by the trustee out of the funds in his hands.

(157 Fed. 212.)

BURGESS SULPHITE FIBRE CO. et al. v. DREW et al.

(Circuit Court of Appeals, First Circuit. November 21, 1907.)

No. 687.

TRIAL—STATE STATUTES AS EVIDENCE—PRESENTATION TO JURY.

Plaintiffs, claiming a lien thereon for wages under the statutes of Vermont, and also a general indebtedness, attached certain logs and pulp wood in the possession of a contractor, who had agreed to sell and deliver the same to defendants in New Hampshire, and had given them a mortgage thereon. Pursuant to some agreement made between one of the plaintiffs and one of the defendants, plaintiffs released the attachment, and the property was delivered to defendants. Having obtained a judgment against the contractor, plaintiffs demanded payment of the same from defendants, and, being refused, brought suit in a federal court, alleging that defendants had promised to pay such judgment when the attachments were released. This was denied by defendants, who claimed that their agreement was to account for the logs in case plaintiffs established a lien thereon. The only witnesses upon the issue were the two persons between whom the agreement was made, who contradicted each other. Under the laws of Vermont, defendants would have had the right to contest the validity of plaintiff's lien. *Held*, that such laws were material as bearing upon the disputed question of fact as to the actual agreement made, and that it was error for the court to refuse defendant's request to present them to the jury in its charge.

In Error to the Circuit Court of the United States for the District of New Hampshire.

Orville D. Baker (Daniel J. Daley and Herbert I. Goss, on the brief), for plaintiffs in error.

Thomas F. Johnson, for defendants in error.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

PUTNAM, Circuit Judge. Throughout this opinion we will speak of the plaintiffs below, now the defendants in error, as the plaintiffs, and of the defendants below, now the plaintiffs in error, as the defendants. There was a verdict for the plaintiffs, and judgment thereon; and the defendants took out this writ of error. It should be observed that Burgess, one of the defendants, who represented the other defendant, has been treated in the record as standing for both defendants; so that where his name is used it is to be accepted as meaning both himself and the corporation which he represented, and vice versa. The facts, as stated from the standpoint of the plaintiffs, are as follows:

"In 1900, one E. C. Goodhue had contracted to sell and deliver to one of the defendants, the Burgess Sulphite Fibre Company, a large quantity of pulp wood from the towns of Canaan and Averill, Vt. This pulp wood had been hauled and landed on the Willard stream, a tributary of the Connecticut river in Vermont, and was to be run down Willard stream into the Connecticut river,

and finally delivered to the Burgess Company in Berlin, N. H. The plaintiffs had furnished Goodhue labor and supplies for his operations in cutting and hauling this wood to the amount of nearly \$3,000, which he had failed to pay. When the spring freshets came on, and the parties had begun to run the wood down Willard stream into the Connecticut river, the plaintiffs brought suit against Goodhue; attached this wood on Willard stream, and the attaching sheriff threw a boom across the stream, stopped the wood by actual manual seizure, and held it completely within his control. Copies of the writ and sheriff's returns were also immediately filed in the offices of the town clerks in the towns where the wood was held. A few hours after this attachment and seizure of the wood, Mr. Burgess, one of the defendants and mortgagee of the wood, called up one of the plaintiffs by telephone, and told him if they would let the wood go they (the defendants) would pay the plaintiffs' claim for the supplies and labor furnished Goodhue, as soon as the sum due was ascertained or agreed upon. Relying on this promise and agreement, plaintiffs told the keeper to open the boom and let the wood go, which was done; and they also directed the sheriff to release the attachment. The suit against Goodhue was contested, but judgment for plaintiffs was obtained for the full amount claimed. Defendants were afterwards notified of the judgment, and payment was demanded. Payment not being made, this suit was brought against the defendants on their alleged contract."

The facts as given by the defendant do not materially differ except on the question of the nature of the promise given the plaintiffs on which the present suit was brought. The attachment was made generally, and also particularly for the purpose of enforcing an alleged lien under the statutes of Vermont on the property attached. The defendants maintain that the only promise given was what was testified to by Burgess, to the effect that, if Warren E. Drew, one of the plaintiffs, would bring a lien receipt to Berlin, he (Burgess) would sign it if he (Drew) would release the pulp wood. This was over the telephone. As to the nature of the promise the parties were squarely at issue, and this issue turned on the testimony of Warren E. Drew and Burgess as to this conversation over the telephone, without either having any direct support from other proofs as to what was the true version.

There is no question that, immediately after the conversion between Burgess and Drew, the attaching officer released possession of the logs, and that they floated into New Hampshire, and came into the hands of the defendants, and were disposed of by them.

The writ against Goodhue contained the following directions:

"And you are also further commanded to attach all the logs, timber, and pulp wood now in Willard stream in the towns of Canaan and Lemington in said county of Essex, in order to preserve and secure the plaintiffs' lien thereon for the indebtedness set forth in the writ of services in hauling and driving said lumber, timber, and pulp wood."

There seems to be no substantial question on the proposition that the deputy sheriff made the proper returns to the various officers of the town clerks in the towns in which were situated the property attached, in accordance with the statutes of Vermont in regard to effectuating liens; and the same is true on the proposition that those returns, together with the order of the writ which we have quoted, were in due form to effectuate a lien under those laws. All these facts are to be kept in mind in considering the defendants' assignment of alleged errors.

Immediately after the logs were released, or perhaps so near thereto that the occurrence might be said to have been simultaneous therewith, a receipt was given to the deputy sheriff by the defendants as follows:

"Canaan, Vermont, June 2nd, 1900.

"Received from Carlisle N. Green, deputy sheriff of Essex County, Vermont, about 1,000 cords of pulp wood of the value of six thousand dollars which was attached by said Carlisle N. Green, on a writ in favor of W. E. and J. W. Drew, to enforce and preserve their lien for labor in hauling and driving said logs and pulp wood, which logs and pulp wood we hereby agree to account for to said sheriff to answer any execution which the said plaintiff may recover in their said suit.

Burgess Sulphite Fibre Co.,

"By T. P. Burgess, Treas."

There is, apparently, no substantial question that, in Vermont, in a suit brought on this receipt, the receptor might have shown that the plaintiffs had no lien claim, or that the lien claim was subject to the mortgage, if there was one; so that, in a suit on the receipt, the plaintiffs might have recovered nothing, or perhaps a portion of their debt only pro tanto, according to the facts as they actually existed. Therefore, there may be a broad distinction between the promise alleged by the plaintiffs to have been made by Burgess and a promise to give a receipt; so that the question whether, under the laws of Vermont, the plaintiffs had an absolute lien on the property attached as against an alleged mortgage, or no lien at all, was an essential element in determining the probabilities whether the defendants agreed absolutely to pay the debt due the plaintiffs from Goodhue, or only promised to give a receipt which would secure to them possession of the logs, and postpone all substantial questions for future determination. Therefore, the relations of the laws of Vermont to the existing circumstances constituted an important element in enabling the jury to ascertain what the probabilities were in regard to the conflicting versions of the conversation between Drew and Burgess.

The statute giving liens of the class involved here is found in section 2282 and sequence of the Vermont Statutes 1894, of which section 2282 is as follows:

"Sec. 2282. A person cutting or drawing logs shall have a lien thereon for his wages which shall take precedence of other claims except public taxes, and continue sixty days, after the services are performed. Such lien shall not attach until the person claiming it files in the office of the clerk of the town where he performed the services, or if the town is not organized, in the county clerk's office, a brief statement of the contract under which he claims a lien, and his purpose to enforce it against the property for the amount due for such service."

The plaintiffs' claim against Goodhue did not arise out of any cutting or drawing of logs, but it was for supplies furnished him in carrying on his operations. Therefore, the plaintiffs do not seem to have been within the description of the persons to whom the lien statute relates, or to have had any claim for wages, which are apparently the only thing protected. *Quimby v. Hazen*, 54 Vt. 132, 138, 139. Also, it is apparently conceded that no lien under the laws of Vermont would take priority over defendants' mortgage, if they had one. The defendants called a witness to prove the law in these respects, which was re-

jected, and properly so, as the federal courts are assumed to know the laws of all the states.

In some respects the positions taken by the defendants in relation to the various topics as to the alleged liens on the logs were so confused and inconsistent as to tend to mislead the court, and to prevent it from understanding on what propositions they wished to rest. Nevertheless, on going through the record carefully, we are satisfied that, for the reasons we have stated, as bearing on the probabilities as to what sort of a contract the parties would have been the more likely to have made for the purpose of securing a release of the logs, the defendants were entitled to have the various propositions as to the laws of Vermont, to which we have referred, clearly and fully sifted out and explained to the jury; that the defendants ultimately requested such explanations; that they failed to obtain them; that they duly excepted in reference thereto; that the lack of such explanations was presumably detrimental to the defendants; that, notwithstanding the varying positions of the defendants, they ultimately worked out the substantial propositions which we have considered; and that, in consequence of all the same, the judgment and verdict must be set aside, and a new trial ordered.

With reference to the local statutory and common law of Vermont, we add that the various propositions which we have stated have not been so thoroughly discussed at bar that we venture to assert that our conclusions in reference thereto might not be changed on further consideration. Therefore, we do not intend that the Circuit Court shall absolutely accept those conclusions. We leave that court to sift out the local law as it should be sifted out, notwithstanding the observations which we have made. On this topic our only decisive holding is that the defendants were entitled to the explanations for which they asked.

The defendants assign and have brought to our attention various other alleged errors. Among the rest is the proposition that, when money is exacted from a person by virtue of the unlawful retention of his goods, the money cannot be retained by whosoever received it. The defendants have elaborated this, and have cited numerous authorities. Of course, there are various aspects of this topic, some of which require that there should have been a protest, others that the person having possession of the goods should have means of knowledge, or even know, that he is a tort-feasor, and others which eliminate every transaction which bears the aspect of a fair compromise, or of accord and satisfaction. It is unnecessary to go through the cases cited on this topic, which has been summed up by so authoritative a work as Perkins' 11th Edition of Chitty's Law of Contracts, vol. 2, 941, as follows:

"It is likewise an undoubted proposition, that, if goods be wrongfully taken or retained, and a sum of money be paid, merely for the purpose of obtaining possession thereof, especially if it be paid under protest, such money can be recovered back, not on the ground of duress, but simply because the payment thereof was not voluntary."

It is to be noted that the rule applies only where the person receiving the money has wrongfully taken or detained the goods, and the

money is paid merely for the purpose of obtaining possession. Therefore, it is plain that the whole topic is inapplicable here, because, at the time the promise on which this suit was brought was made, neither the plaintiffs nor the deputy sheriff were tort-feasors. Whatever might have been the fact if the defendants as mortgagees, if they were such, had demanded possession from the deputy sheriff, and he had refused to surrender the property, the situation when the conversation between Burgess and Drew occurred was simply that the deputy sheriff had lawfully attached the logs as belonging to Goodhue, no mortgagee had intervened, the claim in suit was an honest one, and the right to attach, even if there was no lien, was also clear until, at least, a mortgagee made a demand on the deputy sheriff or the plaintiffs; so that the fundamental element on which the defendants most rely disappears. Moreover, the transaction has the aspect of a fair arrangement throughout, and not that of an agreement to pay money forced by a wrongdoer.

We will touch only very briefly on what remains, observing at the outset that we see no error in the case except what we have already pointed out. The defendants make the point that the fact that the attaching officer was a deputy sheriff could have been proven only by the record, which is true; but the attempt to prove that fact strictly was withdrawn, and the witness, who was the alleged deputy, was allowed to prove that he was acting as such. This is not only within the settled practice, but there was, in fact, no real dispute that he was what he assumed to be, so that the whole topic was without detriment. Thus, also, the question whether it was proper for the plaintiffs to prove by oral testimony that an attachment was made in the manner which we have described was absolutely trivial, because the record evidence of the attachment is in the case. Likewise as to the exception with reference to the admission of evidence to prove that there was no dispute between the plaintiffs and Goodhue about the amount of the claim; as to the proposition that oral testimony was not admissible to prove that the attachment had been discharged; as to the objection made to the plaintiffs' reading from the statutes of Vermont the provisions regarding attachments of personal property subject to mortgages; and as to the exception to the ruling that, under the laws of Vermont, it was necessary for an officer, in order to make an effectual attachment of logs, to take possession of them. The officer did take possession of the logs in the manner described by the plaintiffs, so that whether or not it was necessary for him to take possession was unimportant. He released the logs, as we have said, and they floated beyond the jurisdiction of the state of Vermont, so that what was the technical way under the statutes of Vermont of formally discharging an attachment was also unimportant; and all the topics to which we thus refer were either unimportant on the real issue in the case, or so thoroughly established by record evidence that the oral proofs could not have been detrimental.

To sum up all we have said, we are not impressed with the fact that there is any error in the record, substantial or otherwise, except the failure to make clear to the jury the laws of Vermont relating to liens, and the application of those laws to the case on trial. We are sure

there is no other substantial error; but the one pointed out is sufficient to entitle the defendants to prevail before us.

The judgment and verdict are set aside; the case is remanded to the Circuit Court for further proceedings consistent with our opinion passed down this day; and the appellants recover their costs of appeal.

(157 Fed. 217.)

WORCESTER BREWING CORP. v. RUETER & CO.

(Circuit Court of Appeals, First Circuit. November 14, 1907.)

No. 724.

1. TRADE-MARKS AND TRADE-NAMES—WORDS SUBJECT TO APPROPRIATION—“STERLING.”

Although the word “sterling” is ordinarily descriptive of quality, and is not popularly used in connection with ale, one who adopted it to identify a particular manufacture of ale may be entitled to protection against its use by another in such manner as to create confusion as to the origin or identity of the two products.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, §§ 6, 12.

For other definitions, see Words and Phrases, vol. 7, p. 6658.]

2. SAME—SUIT FOR INFRINGEMENT—RIGHT TO ACCOUNTING—LACHES.

Under the circumstances of this case, complainant, although it may be entitled to an injunction, is barred by its laches from the right to an accounting for profits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 112.

Laches as defense in suit for infringement, see notes to Taylor v. Sawyer Spindle Co., 22 C. C. A. 211; Richardson v. D. M. Osborne & Co., 36 C. C. A. 613.]

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Louis W. Southgate, for appellant.

George W. Anderson (Conrad J. Rueter, on the brief), for appellee.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This is a bill in equity to restrain unfair competition regarding the use of the words “Sterling Ale” in connection with ale put on the market by the respondent below, now the appellant. We will herein call the complainant below the complainant, and the respondent below the respondent. The main facts are stated in the opinion of the Circuit Court ordering a decree for the complainant for an injunction and an account. The main issue arises from the fact that the word “Sterling” is claimed to be one in common use and ordinarily descriptive of quality. The first question is whether the injunction should be affirmed, and the second is whether there should be an account of profits.

The word “Sterling,” although in common use, and although ordinarily descriptive of quality, is not properly used in connection with ale,

and would hardly be used in that connection except for some special purpose. For such special purpose the complainant had adopted the word in connection with its ale, and had occupied the market, and its ale had become known in the trade, both wholesale and retail, as "Sterling Ale." The respondent corporation was organized by a gentleman who had been in the employment of the complainant selling "Sterling Ale," and who, therefore, understood its quality and the value of the word "Sterling" in connection therewith. The respondent made no effort to make known to the public the difference between the origin of its ale and the origin of the complainant's. Therefore, so far as the injunction is concerned, all we need add is what was quoted by Judge Coxe, in an opinion given in behalf of the Circuit Court of Appeals for the Second Circuit in *Ludington Novelty Co. v. Leonard*, 127 Fed. 156, 62 C. C. A. 269, in regard to a word of a somewhat descriptive class, as follows:

"If the complainant, or its assignors, had not brought the word into general use as applicable to the style of game board and games in question here, it is not probable that it would have been generally so used or understood, or that the defendants would have made use of it in the way they have."

On the question of an accounting, if it were an open one, we might question whether on principle there could be any, inasmuch as on the record before us the complainant has no trade-mark in the proper sense of the word, so that the respondent has not availed itself of what was the complainant's property. The federal statute permitting the recovery of damages by a bill in equity relates only to suits on patents for inventions. However, in *Singer Manufacturing Company v. June Manufacturing Company*, 163 U. S. 169, 204, 16 Sup. Ct. 1002, 41 L. Ed. 118, which involved only the question of unfair trade, the court expressly directed an accounting of profits. This seems to settle that there may be an accounting wherever the ground of a proceeding in equity is the same as that at bar.

It appears that the respondent sold in all 17,600 barrels of ale under the name of "Worcester Sterling Ale" between some time in 1900 and April 1, 1905. What has been sold since April 1, 1905, the record does not show. We might well suppose that the master, if the case was sent to one, would conclude that all the ale thus sold was marketed on account of the use of the word "Sterling." We might suppose this, because the record shows that the complainant's ale thus designated has a peculiar quality, so that perhaps the unlawful sales created an addition to the respondent's market equal to the number of barrels sold which bore the word complained of. Consequently, there seems to be a substantial basis for an accounting so far as the sum involved is concerned, and the question which the record presents arises out of alleged laches on the part of the complainant. This does not seem to have been especially considered by the Circuit Court, except as it described the complainant's delay as blameworthy, though not enough to deprive him of all remedy.

In October, 1904, notice of the complainant's claim to control the word "Sterling" was given the respondent. This bill was filed on November 3, 1904. In July, 1903, as shown by the testimony of Mr. Rueter, he not only purchased at Bellows Falls a bottle of respondent's

"Worcester Sterling Ale," with that label on it, but he also then stated that it was an imitation brewed in Worcester, showing that he had previous knowledge of it. He was the vice president and treasurer of the complainant corporation. Therefore, as he made a report of the facts to the directors immediately, the corporation must be charged with notice. Nevertheless, no warning was given the respondent until October, 1904. The respondent expended approximately \$1,500 in advertising its "Worcester Sterling Ale," having begun this subsequently to May 1, 1903. It is plain that this very considerable expenditure in the way of signs and advertising was mainly incurred after what happened at Bellows Falls.

The main fact to which we call attention in this connection is that it is to be presumed that the respondent was acting in good faith, believing that it had a right to use the word "Sterling." This arose partly from the fact of the nature of the word, one of common description of quality in certain classes of goods, partly from the fact that in registering its Massachusetts trade-mark the complainant had stated that the word was not essential, and partly from the advice of its counsel. Under these circumstances the respondent ought not to be a sufferer by reason of lack of diligence on the part of the complainant in giving warning, either with reference to the period before the warning was given or pending a reasonable time thereafter to ascertain its legal rights.

If the case had been free from doubt, and if, consequently, the course of the respondent had amounted to willful piracy, the circumstances to which we have referred might not have been of moment; but, as it stands, the equity of the complainant as to an accounting is especially weakened by the fact that the expenditures made by the respondent in pushing its business were largely after the complainant had full notice of the infringement in the manner we have shown. The delay was not very long, a little more than a year; but on the question of laches, the length of the delay is more or less important in connection with the other circumstances. Moreover, it is difficult to understand how the complainant could have had knowledge of the facts to which we have referred, and have remained quiet for more than a year, except on the hypothesis that it impliedly waived the infringement for the time being. Quite likely the complainant underestimated the importance of the business done by the respondent, and had no intention of seeking any remedy until it came later to appreciate that the respondent's business was increasing, while its own was falling off. On any theory, the complainant ought not to benefit at the cost of a loss to the respondent.

McLean v. Fleming, 96 U. S. 245, 256, 24 L. Ed. 828, and sequence, and *Menendez v. Holt*, 128 U. S. 514, 524, 9 Sup. Ct. 143, 32 L. Ed. 526, settled the rule that circumstances may sometimes justify an injunction while the delay attending the proceedings would bar an account of profits; though it is true that, in these cases, the periods of delay were so long that neither of them offers a close analogy for the case at bar. In *Fairbank Co. v. Luckel Co.* (C. C.) 106 Fed. 498, affirmed by the Court of Appeals for the Ninth Circuit, 116 Fed. 332, 54 C. C. A. 204, it was, however, observed with reference to the length

of time which may make laches of importance, that "it will necessarily depend upon the intention of the infringer whether fraudulent or not." It was also said that it was doubtful whether fraudulent intention existed on the part of the respondent, and that, "in such a case, laches for a much shorter period than that which in fact had intervened might have been held sufficient to justify the denial of relief by way of accounting." Also in *The French Republic v. Saratoga Vichy Company*, 191 U. S. 427, 439, 24 Sup. Ct. 145, 48 L. Ed. 247, the opinion, on the defense of laches, gave weight to the fact that there was little evidence in the record of any purposed fraud.

Very sensible statements of the rules as to laches are found in *Sebastian's Law of Trade-Marks*, 4th Ed. (1899), at pages 206 and 207. It is there said:

"Even if the delay has not been such as to disentitle the plaintiff to his injunction, it may yet obtain some indulgence for the defendant; as, for instance, the permission to dispose of the wares on which he expended money in consequence of the plaintiff's delay. Or the injunction may be granted and the account of profits or damages by which it is usually accompanied withheld."

A powerful inducement to deny an accounting by reason of laches was spoken of by Lord Justice Mellish in *Ford v. Foster*, L. R. 7 Ch. 611, 633, where it was suggested that, instead of getting profits according to the practice in equity covering six years while he was quiescent, the complainant would probably get from a jury only 40 shillings damages, on the ground that there would be no evidence of specific loss.

It is suggested by the complainant that its delay was only such as was necessary to enable it to investigate the truth before involving itself in litigation, and that, also, the facts known to it in July, 1903, did not justify it in assuming that the respondent was deliberately using its trade-mark. What happened at Bellows Falls disproves any such necessity. Whether or not Rueter supposed the expression complained of was being deliberately used is of no particular consequence, because, if it was being innocently used, there was, at least, as much occasion for giving prompt warning. The fact is that, in July, 1903, even if it preferred to delay litigation for any just reason, the complainant certainly had all the materials necessary to enable it to give the respondent prompt notice.

The judgment of the Circuit Court is reversed, and the case is remanded to that court with directions to enter a decree for an injunction only; and the appellant recovers its costs of appeal.

(157 Fed. 220.)

GRING v. BOYER.

(Circuit Court of Appeals, Third Circuit. November 18, 1907.)

No. 28.

COLLISION—STEAM VESSELS MEETING.

Libellant's tug *Patton*, coming up the Delaware river at night with a tow on her starboard side, came into collision with the tug *Cahill*, passing down with a similar tow. The master of the *Patton* testified that shortly before the collision he saw the white towing lights of a vessel a half

mile ahead of him, but seeing no side lights he was unable to tell which way it was going. He gave a signal of one whistle and ported his helm, and receiving no answer he signaled again and again, ported and still received no answer, and shortly afterwards the Patton was struck on the port bow by the tow of the Cahill. *Held*, on the evidence, that the lights seen by the Patton were not those of the Cahill, but of another tug going up the river with a car float which passed on the starboard side of the Cahill and was between her and the Patton until the latter ported; that the Patton was in fault and responsible for the collision in violating rule 3 of the Inland Navigation Rules, Act June 7, 1897, c. 4, 30 Stat. 100 [U. S. Comp. St. 1901, p. 2882], which requires a vessel when approaching another whose course she fails to understand to signify such fact by several blasts, or rule 8, which prohibits an overtaking vessel from passing without the consent of the vessel overtaken.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, §§ 33-42. Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

For opinion below see 130 Fed. 989.

Henry R. Edmunds, for appellant.

Alfred Driver and Curtis Tilton, for appellee.

Before DALLAS and GRAY, Circuit Judges, and CROSS, District Judge.

CROSS, District Judge. The libel in this case was filed by Lewis Boyer, managing owner of the tug "John B. Patton," against Charles Gring, owner of the tug "Winfield S. Cahill," and managing owner of the barge "Berks," to recover damages to the tug "Patton," growing out of a collision between said vessels which occurred on the Delaware river, nearly opposite Coopers Point, November 28, 1900, at about 6 o'clock in the evening. Shortly prior to the accident, the tug "Patton," with the barge "Empire City" in tow, had started from Point Breeze and was proceeding up the Delaware river bound for the Gas House Wharf at Tioga street, while the tug "Cahill," with the barge "Berks" made fast to her starboard side, had left Pier 16, Port Richmond, Philadelphia, and was coming down the river bound for Norfolk, Va., but intending to stop at the Reed Street Wharf, Philadelphia, for another barge to be taken in tow. The "Patton" and her tow were, at the time, showing proper lights. There is some conflict in the testimony as to whether the barge "Berks" showed a green light on her starboard side, but we think the weight of the testimony shows that she did show such a light, and that as a matter of fact both tugs with their tows were properly lighted at the time of the collision. It was a starlight night, but dark. There was a light breeze blowing, and the tide was nearly flood. The testimony, as is not unusual in collision cases, is very conflicting, and it is almost impossible from the maze to ascertain the true state of facts. It should be borne in mind from the outset, however, that the burden of proof rests upon the libellant to show that the "Cahill" and her tow were in some material respect at fault, whereby the collision was caused.

The captain of the "Patton" admits that he saw the white towing lights of what he swears was the "Cahill" ahead of and slightly on

his port bow when she was about half a mile distant; that he thereupon gave a signal of one blast of his whistle to denote that he was keeping to the right, while at the same time he ported his helm about two points; that receiving no answer to his signal, he thereupon gave another blast of his whistle, and again ported his helm. He also admits that because he could not see the side lights of the boat in front of him, he was unable to tell definitely whether she was going up or coming down the river. There is, however, considerable testimony in the case tending to show, and which we think does show, that between the "Patton" and the "Cahill," just prior to the collision, there was a car float in the tow of a tug going up the river, and in order to reconcile the testimony of the captain of the "Patton" with the other testimony, we are compelled to conclude that the towing lights which he saw ahead, and which occasioned him to give the warning whistles above referred to, were the mast lights of the tug towing the car float, and not those of the "Cahill." Indeed, from the positions in which the tugs "Cahill" and "Patton" must have been at the time the first warning blast was blown, it would apparently have been impossible, owing to a bend in the river, to see the "Cahill" off the port bow of the "Patton" where the captain of the "Patton" says he first saw her. The captain of the "Cahill" testified positively to passing the car float on his starboard side, just before the collision, and the evidence reasonably satisfies us that it was the intervention of this car float which obscured the side lights of the "Cahill" from the lookout of the "Patton."

We deem it unnecessary, in this connection, to refer specifically to other evidence than that of the captain and mate of the "Cahill," both of whom were on watch at the time of the collision, and who testify that the "Patton" came out suddenly from behind the car float, and that when they saw her they immediately reversed their engine, and did everything in their power to prevent a collision. Their testimony in this respect is furthermore corroborated by an uncontradicted admission of the captain of the "Patton," made only a week or 10 days after the accident, and which is in direct conflict with the evidence given by him at the hearing. The admission was in response to the following salutation, addressed to the captain by the witness who testified to the interview: "I am glad to see you again. I heard you came near drowning." The captain answered: "Yes;" and added: "Well, it was an unavoidable case, as there was a car float came in between my boat and the 'Cahill,' or it would not have happened." The witness also testified that the captain said nothing about whistles or lights. It is true there is other evidence either directly conflicting or not readily reconcilable with the above, but the same might be said of any view of the case which could possibly be taken. Accepting then, as we do, the above as presenting the true situation of affairs, it is obvious that the "Cahill" was not in anywise at fault. The captain of the "Cahill" appears to have maintained a straight course throughout, and when the captain of the "Patton" ported his helm to pass to the starboard of the boat in front of him, he was attempting to pass to the starboard of the car float, and not of the "Cahill," and passing out, as he did from the stern of the car float diagonally across the

river, he suddenly and unexpectedly encountered and collided with the "Cahill" which was still maintaining her course. This theory would have caused the "Cahill" to strike the port bow of the "Patton" at about the angle at which it appears from the testimony she was struck.

This disposes of the case; but another view of the testimony might be taken which leads to the conclusion that the "Patton," whatever be said of the "Cahill," was at least measurably in fault. As already stated, her captain admitted that he did not know which way the boat on which he saw the white towing lights ahead of him was going when he twice sounded his whistle and ported his helm. In acting, therefore, as he did, he clearly violated rule 3 or rule 8, Act June 7, 1897, c. 4, 30 Stat. 100, 101 [U. S. Comp. St. 1901, p. 2882], which are as follows:

"When steam vessels are approaching each other, if either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle."

"When steam vessels are running in the same direction, and the vessel which is astern shall desire to pass on the right or starboard band of the vessel ahead, she shall give one short blast of the steam whistle, as a signal of such desire, and if the vessel ahead answers with one blast she shall put her helm to port; or if she shall desire to pass on the left or port side of the vessel ahead, she shall give two short blasts of the steam whistle as a signal of such desire, and if the vessel ahead answers with two blasts, shall put her helm to starboard; or if the vessel ahead does not think it safe for the vessel astern to attempt to pass at that point, she shall immediately signify the same by giving several short and rapid blasts of the steam whistle, not less than four, and under no circumstances shall the vessel astern attempt to pass the vessel ahead until such time as they have reached a point where it can be safely done, when said vessel ahead shall signify her willingness by blowing the proper signals."

The act of Congress in which the above rules appear provides that they, with other regulations therein found for preventing collisions, "shall be followed by all vessels navigating all harbors, rivers, and inland waters of the United States," with certain exceptions which need not be mentioned here, as they have no applicability to the present situation. Whether, therefore, the boat upon which the captain of the "Patton" saw the mast lights was going from or coming towards him, he clearly shows himself in fault. In either case he violated a prescribed rule of navigation, for he admits that he went ahead without receiving any answer to his signal in total ignorance of the direction the boat in front of him was taking.

Upon the whole case, then, we think the libelant has not shown satisfactorily, by the weight of the testimony, that the respondent's negligence caused the collision. It should be noted in this connection that the fact, if fact it be, that the "Cahill" was on the wrong side of the river, as found and relied upon by the learned judge below, was not set forth in the libel as one of the grounds of complaint.

The decree below should be reversed, with costs.

(157 Fed. 229.)

MICKLE v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 4, 1907.)

No. 2,582.

1. CRIMINAL LAW—TRIAL—DIRECTION OF VERDICT.

The evidence in every criminal case should be sufficient to warrant a reasonable conclusion of the defendant's guilt, otherwise it is the duty of the court to instruct a verdict in his favor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1727-1729.]

2. LARCENY—SUFFICIENCY OF EVIDENCE.

A verdict of conviction in a prosecution for larceny *held* not supported by any legal evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, §§ 164-169.]

In Error to the United States Court of Appeals in the Indian Territory.

P. D. Brewer and Guy L. Andrews, for plaintiff in error.

T. B. Latham, U. S. Atty.

Before VAN DEVANTER and ADAMS, Circuit Judges, and RINER, District Judge.

RINER, District Judge. The plaintiff in error, Ed Mickle, was indicted by the grand jury sitting within and for the central district of the Indian Territory for the larceny of four hogs, the property of Enoch Kindle. The indictment was returned on the 15th of November, 1904, and charged that the larceny was committed on the 20th of December, 1902. A trial was had on the 15th of March, 1905, the plaintiff in error convicted and sentenced to two years in the penitentiary. He filed a motion for a new trial, which was overruled. He then took an appeal to the United States Court of Appeals in the Indian Territory (98 S. W. 349), which affirmed the judgment of the trial court, and the case is brought here upon a writ of error to that court.

Several errors are assigned; but in the view we have taken of this case it will only be necessary to notice the third, which is as follows: "Third, the court erred in failing to instruct the jury to acquit the defendant." The rule is, as often declared, that this court will not weigh the evidence to pass upon conflicts therein, but will look into it only to see whether there was error in not directing a verdict, because there was no evidence to sustain the verdict rendered. We have carefully read all of the testimony submitted, and are of opinion that the most that can be said for it is, that possibly it might raise a conjecture or suspicion unfavorable to the defendant. But evidence only sufficient for this purpose is not legal evidence, for the jury must be governed by the evidence of facts upon which the suspicion is based, not by the suspicion itself. The evidence in every criminal case should be sufficient to warrant a reasonable conclusion of the defendant's guilt. Otherwise it is the duty of the court to instruct a verdict in his favor. While it is true we find a statement in the bill of exceptions that "the

above is all of the evidence offered by either side in the case," and to which statement the district attorney added the following: "I think the foregoing states fairly well the evidence as corrected as it was given in the trial of the case"—yet the transcript of the evidence as contained in the record does not suggest a careful or accurate stenographic report of the testimony, and possibly there are omissions of evidence upon which the able and learned judge of the lower court acted. However this may be, with this statement in the record, we are governed by the record as we find it. Our conclusion is that there was no evidence to sustain the verdict rendered, and that the trial court should have instructed the jury to return a verdict for the defendant.

The judgment of the United States Court for the Central District of the Indian Territory, and the judgment of the United States Court of Appeals in the Indian Territory, which affirmed the judgment of the trial court, are reversed, and this case is remanded to the United States court for the Central District of the Indian Territory, with instructions to grant a new trial.

(157 Fed. 230.)

VILTER MFG. CO. v. OTTE.

(Circuit Court of Appeals, Eighth Circuit. November 6, 1907.)

No. 2584.

MASTER AND SERVANT—INJURY TO SERVANT—FELLOW SERVANTS.

The fact that a foreman in charge of a single job of work being done by defendant corporation, who worked with the men under him, had the power to hire and discharge them and to direct their movements in that particular work, did not erect that single job into a department of defendant's business so as to make the foreman a vice principal, but he remained a fellow servant with the men under him, and for his negligence resulting in an injury to one of such men defendant cannot be held liable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 422-488.

Who are fellow servants, see notes to Northern Pac. R. Co. v. Smith, 8 C. C. A. 668; Flippin v. Kimball, 31 C. C. A. 286.]

In Error to the Circuit Court of the United States for the District of Nebraska.

Ralph W. Breckenridge (Charles J. Greene, on the brief), for plaintiff in error.

Edson Rich (J. C. Cook, on the brief), for defendant in error.

Before VAN DEVANTER and ADAMS, Circuit Judges, and RINER, District Judge.

ADAMS, Circuit Judge. The manufacturing company was engaged in installing a refrigerator plant in a brewery in Fremont, Neb., and while lifting into place some refrigerating pipe, Otte, one of its employés, was injured. He successfully prosecuted a suit for damages in the court below, and this writ of error is brought to secure a reversal of the judgment. The court below was requested at the close of all the evidence to direct a verdict in favor of the defendant on the

ground that if there was any negligence it was the negligence of a fellow servant. Instead of complying with that request the court instructed the jury that "the person in charge of the work on the part of the defendant [whose name was Wright] had control of the men, the employment of the men, and discharging them and directing them, and for that reason the court instructs you as a matter of law that he was the vice principal, * * * and not a fellow servant." It will be assumed that there was evidence tending to show the facts upon which the learned trial judge predicated his conclusion. There was also evidence, which is undisputed, that Wright was the foreman in charge of the men on the job, that he worked with them doing the same manual labor which they did, and that he worked under the immediate direction of a man by the name of Flemming, who was the general western agent of the defendant company, and who was frequently at Fremont during the progress of the work. Wright ordered one of the six men working with him and under his direction to knock out a support which was holding up a heavy frame of refrigerating pipes about to be elevated into place by a block and tackle. In obedience to that command the support was removed, and the suspended frame swung and lurched in some way unnecessary to specify and caught Otte by the thumb and lacerated it so that it had to be amputated. The negligence charged and relied upon for a recovery was the giving of the order to remove the support suddenly and without warning to plaintiff.

The logic of the charge, in view of the undisputed evidence, is that, even if Wright was only a foreman actually working with a gang of men under the immediate direction of a superintendent, yet if he had charge of the work, the right to hire and discharge men for that work, and to direct them in that work, he was a vice principal, and his negligence was imputable to the master. The evidence does not disclose that defendant was engaged in a business which naturally or reasonably, within the rule laid down in *B. & O. R. R. v. Baugh*, 149 U. S. 368, 383, 13 Sup. Ct. 914, 37 L. Ed. 772, consisted of different departments which required different executive heads, or that there were any such departments. On the contrary, so far as disclosed by this record, the defendant had one business, simple and indivisible in its character, and directed as usual by its general officers or agents. There is no proof that Wright was intrusted with the management and supervision of defendant's entire business, or of any separate department as known to the law. He, with the plaintiff, was engaged at the time of the injury to the latter in executing a single and separate piece of work, one out of many in the general business of the master; and at the time of the injury they were actually working together in doing the act which produced the injury.

In these circumstances the fact that Wright had actual control of the crew, the power to hire and discharge them, and to direct their movements in that particular work, did not erect that single job into a department of defendant's business, and did not make him a vice principal. *Alaska Mining Co. v. Whelan*, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390; *City of Minneapolis v. Lundin*, 7 C. C. A. 344, 58 Fed. 525; *United Zinc Companies v. Wright*, 156 Fed. 571;¹ *Westing-*

¹ 84 C. C. A. 337.

house, Church, Kerr & Co. v. Callaghan (C. C. A.) 155 Fed. 397,² recently decided by this court. He was in law and fact a fellow servant with the plaintiff in the construction of the refrigerating plant in question, and the risk of his negligence, if any, was assumed by his co-employés. Any other conclusion would make every separate job a separate department of business and every workman whose duties embraced the exercise of temporary authority over his fellows a vice principal. Such is not the law. Under the authority of the cases just referred to, the plaintiff was not entitled to recover, and the court should have instructed the jury, as requested, to find a verdict for defendant. The judgment is reversed, and the cause remanded to the circuit court, with directions to grant a new trial.

(157 Fed. 232.)

MORGAN v. BENEDUM et al.

(Circuit Court of Appeals, Fourth Circuit. November 6, 1907.)

No. 716.

BANKRUPTCY—APPEALS—TIME FOR TAKING.

The 10 days allowed by Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], for taking an appeal from a judgment allowing or rejecting a claim, cannot be extended by the filing of a petition for rehearing, after such time has expired, nor will an appeal lie from the ruling on such a petition which is addressed to the discretion of the court.

[Ed. Note.—Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

Appeal from the District Court of the United States for the Northern District of West Virginia.

This case was heretofore before this court, and is found reported in 145 Fed. 466, 76 C. C. A. 236. The original case involved the question of whether a certain trust deed made by the Augusta Pottery Company was invalid because the same constituted a preference of certain creditors over others of said corporation. This court held that the preference existed, and the deed was invalid, and this appeal presents for the consideration of the court the question of whether the lower court erred in allowing holders of bonds of the bankrupt, secured under the mortgage thus declared invalid, to prove their claims in bankruptcy as common creditors, notwithstanding the same were not filed within 12 months of the adjudication of the bankruptcy. Briefly stated, the referee on the 8th of March, 1905, held the deed to be a preference. On the 17th of May, 1905, the district court reversed that holding, and this court on the 1st of May, 1906, rendered its decision reversing the lower court, reported as above stated. Meantime M. L. Benedum and John A. Howard, special receiver, etc., creditors, whose debts are in dispute on this appeal, on the 5th of October, 1905, within one year from the original decision of the referee holding said assignment to be void as a preference, filed their proofs of claim before the referee. On the 26th of July, 1906, and after the mandate of this court had been duly certified to the lower court, that court allowed the said Benedum and Howard, special receivers, to file an amended proof of their said claims, and on said 26th of July, 1906, duly allowed the same in these words: "Upon consideration whereof the court is of opinion that the said John A. Howard, receiver as aforesaid, and the said M. L. Benedum, should be permitted to file said proofs of claim as amendments to the proofs filed by them herein on the 10th day of October, 1905. It is therefore adjudged, ordered, and decreed that said claims be filed; that the claim of John A. How-

² 83 C. C. A. 669.

ard, receiver as aforesaid, amounting with interest to date to \$1,731.75, be allowed as a debt without priority against the estate of Augusta Pottery Company, bankrupt; that the claim of said M. L. Benedum, amounting with interest to date to \$4,040.75, be allowed as a debt without priority against the estate of said bankrupt; that W. Frank Stout, the referee to whom this cause was heretofore referred, be and he is hereby directed to recast the dividend sheets already prepared in this cause so as to include the claims hereinbefore mentioned and in due course to cause all proper dividends thereon to be paid." On the 28th of August, 1906, the appellant herein filed his petitions before the referee, and afterwards, on the 10th of September, 1906, before the court, asking a rehearing of the order allowing said claims, and praying that the same be rejected for the reason that the proof thereof was not filed within the time prescribed by the bankrupt act, and also because the claims were without consideration deemed valuable in law, and void as to bona fide creditors of said company. The lower court allowed the holders of said debts to answer the petitions, and referred the questions arising thereon to the referee. On the 31st of October, 1906, the district court entered an order dismissing the petitions, among other things reciting that the appellant had failed to present proof of the averments made in the time required by the order of reference. From the latter order this appeal is taken.

Scott C. Lowe, for appellant.

Davis & Davis, Riley & Ritz, and Osman E. Swartz, for appellees.

Before PRITCHARD, Circuit Judge, and MORRIS and WADDILL, District Judges.

WADDILL, District Judge (after stating the facts as above). Two questions are presented for consideration. First, whether in point of fact the proofs of claims were presented within the statutory period; and, second, whether the appellant has within the like period taken an appeal from the decision of the lower court allowing the claims.

In the view we take, it is unnecessary to decide the first question raised, though in passing it may be said that it would seem that the holders of the debts should be afforded opportunity to prove their claims as common creditors, after it was finally adjudged that they were creditors of that class. *Keppell v. Tiffin Sav. Bank*, 197 U. S. 355, 25 Sup. Ct. 443, 49 L. Ed. 790, 13 Am. Bankr. Rep. 552. But whatever may be the correct view in this respect, it cannot avail to serve these appellants, as manifestly the appeal from the order allowing the claims was not taken within the time prescribed by the statute. The bankruptcy act of July 1, 1898, c. 541, § 25, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], in plain terms provides that from orders allowing or rejecting a debt or claim of \$500 or over, "such appeal shall be taken within 10 days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation as the case may be." This appeal should have been taken within 10 days from the order of 26th of July, 1906, and the time cannot be extended by means of a petition for review or rehearing filed more than a month thereafter. To do so would be to evade the statute of limitations entirely. The fact that the appeal was taken within 10 days from the order finally denying the application for a rehearing entered on the 31st day of October, 1906, cannot be used to bridge over the period from July to October. No appeal lies from an order rejecting a petition for rehearing under the bankrupt law. Sections 24 and 25 of the bankruptcy act prescribe in what cases

appeals may be had, and these sections manifestly do not cover such a case as this. Loveland on Bankruptcy, §§ 302, 314. Assuming that the appellant relies on the rules and practice in equity causes as controlling in the matter of taking this appeal, he is clearly without remedy, as it is well settled that inasmuch as petitions for rehearing are addressed to the sound discretion of the court, no appeal lies from an order refusing the same. 11 Bates, Eq. Pro. 686; Steines v. Franklin, 14 Wall. 15, 20 L. Ed. 846; Buffington v. Harvey, 95 U. S. 99, 24 L. Ed. 381; Boesch v. Graff, 133 U. S. 699, 10 Sup. Ct. 378, 33 L. Ed. 787.

The decision of the lower court is plainly right, and should be affirmed.

Affirmed.



(157 Fed. 234.)

GILL v. AUSTIN.

(Circuit Court of Appeals, First Circuit. November 21, 1907.)

No. 602.

COURTS—CIRCUIT COURTS OF APPEALS—RULES OF DECISION AS BETWEEN TWO CIRCUIT COURTS OF APPEALS IN DIFFERENT CIRCUITS.

In accordance with the practice in this circuit to follow the decisions of other Circuit Courts of Appeals whenever they may properly form a precedent, *Eidman v. Tilghman*, 136 Fed. 141, 69 C. C. A. 139, is followed on a question of the construction of the statutes with reference to the war revenue tax on legacies.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 327, 328.]

In Error to the Circuit Court of the United States for the District of Massachusetts.

William H. Garland, Asst. U. S. Atty. (Asa P. French, U. S. Atty., and J. C. McReynolds, Special Asst. Atty. Gen., on the brief), for plaintiff in error.

James W. Austin and Francis C. Welch, for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This writ of error involves the same question of statutory construction with reference to the war revenue tax on legacies which was passed on adversely to the United States by the Circuit Court of Appeals in the Second Circuit in *Eidman v. Tilghman*, 136 Fed. 141, 69 C. C. A. 139, decided on February 24, 1905. It is true there is another question involved here, whether or not the legacy on which the tax was assessed ever became effectual; but that we can pass by. *Eidman v. Tilghman* was affirmed by a divided court in 203 U. S. 580, 27 Sup. Ct. 779, 51 L. Ed. 326. It is also said that the same question was decided against the United States by the Circuit Courts of Appeals for the Third Circuit (*McCoach v. Philadelphia Trust, Safe Deposit & Ins. Co.*, 142 Fed. 120)¹ and the Seventh Circuit (*United States v. Marion Trust Co.*, 143 Fed. 301, 74 C. C. A. 439); also by a divided court in *McCoach v. Norris*, 205 U. S. 539, 27 Sup.

¹73 C. C. A. 610.

Ct. 793, 51 L. Ed. 921. Inasmuch as all these decisions were against the United States, we have not had occasion to verify what is claimed with reference to those in the Third and Seventh Circuits. The judgment of the Circuit Court now brought before us for review was in harmony with the result in *Eidman v. Tilghman*. Under the circumstances, it seems of no advantage for us to express any opinion, and, perhaps, it would be presuming for us to do so. It is enough that we refer to our practice, as stated many times, with reference to our disposition to follow decisions of the Circuit Courts of Appeals in other circuits whenever they can form a precedent. In accordance with that practice, we hold that the United States cannot prevail.

The judgment of the Circuit Court is affirmed.

MEMORANDUM DECISIONS.

(156 Fed. 1021.)

ATLANTIC COAST LINE R. CO. v. UNITED STATES. (Circuit Court of Appeals, Fourth Circuit. November 22, 1907.) No. 754. In Error to the District Court of the United States for the Eastern District of North Carolina. For opinion below, see 153 Fed. 918. Geo. B. Elliott, for plaintiff in error. L. M. Walter, Sp. Asst. U. S. Atty., and Harry Skinner, U. S. Atty. Before PRITCHARD, Circuit Judge, and MORRIS and WADDILL, District Judges.

PER CURIAM. Upon an inspection of the record in this case it appears that the writ of error was improvidently granted, in that there was no final judgment in the court below. The writ of error is therefore dismissed, and the District Court will proceed with the case according to law.

(156 Fed. 1022.)

CHOUQUETTE v. MEXICAN CENT. RY. CO., Limited. (Circuit Court of Appeals, Fifth Circuit. November 26, 1907.) No. 1,477. In Error to the Circuit Court of the United States for the Western District of Texas. Geo. E. Wallace and J. A. Buckler, for plaintiff in error. T. A. Falvey and Waters Davis, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The judgment of the Circuit Court is reversed, and the cause is remanded, with instructions to dismiss the suit, without prejudice to an action in any court willing and competent to administer relief under the laws of Mexico. See *Mexican Central Railway Company, Ltd., v. J. W. Eekman, Guardian, etc.*, 205 U. S. 538, 27 Sup. Ct. 791, 51 L. Ed. 920; *Slater v. Mexican Central National Railroad Company*, 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900. The costs of this court to be paid by the plaintiff in error.

(156 Fed. 1022.)

CONTINUOUS GLASS PLATE CO. v. PRESSED PRISM PLATE GLASS CO. (Circuit Court of Appeals, Third Circuit. October 2, 1907.) No. 1,077. Appeal from the Circuit Court of the United States for the Western District of Pennsylvania. Thomas W. Bakewell, for appellee. Cause dismissed, under rule 16. See 150 Fed. (C. C.) 355.

(156 Fed. 1022.)

LOUISVILLE & N. R. CO. v. LACY. (Circuit Court of Appeals, Fifth Circuit. November 18, 1907.) No. 1,730. In Error to the Circuit Court of the United States for the Southern District of Alabama. G. L. Smith and H. T. Smith, for plaintiff in error. J. W. McAlpine, E. M. Robinson, and C. E. Hamilton, for defendant in error. Before PARDEE and SHELBY, Circuit Judges, and BURNS, District Judge.

PER CURIAM. This case was submitted to the jury in accordance with the opinion and judgment of this court in *Lacy v. Louisville & Nashville R. Co.*, 152 Fed. 134, 31 C. C. A. 352; and we find no reversible error assigned or apparent in the proceedings of the trial court in the last trial of the case, and we therefore affirm the judgment rendered.

(156 Fed. 1022.)

LUTCHER & MOORE LUMBER CO. v. KNIGHT et al.* (Circuit Court of Appeals, Fifth Circuit. December 10, 1907.) No. 1,629. In Error to the Circuit Court of the United States for the Western District of Louisiana. J. D. Wilkinson and Geo. E. Holland, for plaintiff in error. A. J. Murff and M. J. Cunningham, Jr., for defendants in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. After a thorough and attentive consideration of the questions raised on this writ, we are of opinion that the matters of defense relied upon by plaintiff in error on the trial below, in so far as they were not given consideration, were of an equitable nature, not cognizable in a court of law. We therefore affirm the judgment of the Circuit Court.

(156 Fed. 1022.)

METROPOLITAN LIFE INS. CO. v. TALBOTT. (Circuit Court of Appeals, Fifth Circuit. December 3, 1907.) No. 1,660. In Error to the Circuit Court of the United States for the Northern District of Texas. Maurice E. Locke and Eugene P. Locke, for plaintiff in error. Wendel Spence, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The judgment of the Circuit Court is affirmed. See 142 Fed. 694, 74 C. C. A. 26.

(156 Fed. 1023.)

MEXICAN CENT. RY. CO., Limited, v. ECKMAN. (Circuit Court of Appeals, Fifth Circuit. November 26, 1907.) No. 1,475. In Error to the Circuit Court of the United States for the Western District of Texas. T. A. Falvey and Waters Davis, for plaintiff in error. Geo. E. Wallace, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. Considering the answer of the Supreme Court of the United States to the questions heretofore certified in this case (see *Mexican Central Railway Co., Ltd. v. J. W. Eckman, Guardian, etc.*, 205 U. S. 538, 27 Sup. Ct. 791, 51 L. Ed. 920, and the case of *Slater v. Mexican Central National Railroad Company*, 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900), the judgment of the Circuit Court is reversed, and this cause is remanded, with instructions to dismiss the same at the costs of the plaintiff below, but without prejudice to an action in any court willing and competent to administer relief under the laws of Mexico.

(156 Fed. 1023.)

ROLLER v. BURKETT et al. (Circuit Court of Appeals, Fifth Circuit. November 26, 1907.) No. 1,553. Appeal from the Circuit Court of the United

*Rehearing denied January 21, 1908.

States, for the Eastern District of Louisiana. Thos. J. Gibson, Hiram Glass, W. L. Estes, Jno. J. King, and C. K. Bell, for appellant. Chas. S. Todd, for appellees. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This appeal is dismissed, on the authority of *Menge v. Warriner*, 120 Fed. 816, 57 C. C. A. 432, and *Cay v. Vereen*, 144 Fed. 839, 75 C. C. A. 667, and authorities there cited.

(156 Fed. 1023.)

WAGGONER et al. v. NATIONAL BANK OF COMMERCE et al. (Circuit Court of Appeals, Fifth Circuit. November 26, 1907.) No. 1,718. Appeal from the Circuit Court of the United States for the Northern District of Texas. W. O. Davis and Sam J. Hunter, for appellants. J. H. Barwise, Jr., Geo. E. Miller, and F. E. Dycus, for appellees. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This is the second appeal in this case. The decree now before us seems to be in accordance with our views as expressed in our former opinion (143 Fed. 53, 74 C. C. A. 207), and in the matters not passed upon in the former appeal seems to be correct. It is, however, somewhat involved, and, as it is suggested that under one aspect of the decree, it might permit a double recovery on the Coffey-Neal chattel mortgage, it is amended by limiting the full recovery by the National Bank of Commerce and the Bank of America, as against W. T. Waggoner and Robert Housells, to the sum of \$13,337.50, together with 10 per cent. interest thereon from date of decree, that being the full amount secured by said chattel mortgage; and, as thus amended, the decree is affirmed.

(156 Fed. 1023.)

ZARAFONITIS et al. v. UNITED STATES.* (Circuit Court of Appeals, Fifth Circuit. December 10, 1907.) No. 1,717. In Error to the Circuit Court of the United States for the Northern District of Texas. Yancey Lewis and Nelson Phillips, for plaintiffs in error. Wm. H. Atwell, U. S. Atty. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. Notwithstanding the exhaustive brief filed, we adhere to our conclusions in this case when it was before the court at a former term (*United States v. Zarafonitis et al.*, 150 Fed. 97, 80 C. C. A. 51); and the judgment of the Circuit Court is affirmed.

*Rehearing denied January 21, 1908.

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Under Shannon's Code Tenn. § 4456, possession of land under assurance of title, if continued for seven years, operates not only to bar an action on a superior title, but to divest that title and vest it in the adverse holder; but, on the other hand, possession without color of title continued for seven years gives a mere right to defend against the title so long as the possession is actual and continuous, under section 4458, which provides that no person shall have any action for any lands, but within seven years after the right of action has accrued, and such right is lost the moment the possession is abandoned. Hence, under such statute as construed by the Supreme Court of the state, where one in possession of land without color of title attorned to another who had made entry from the state of a definite tract, including his own, and agreed to hold possession of the whole for his landlord, the effect was an abandonment of his own possession, and from that time his possession was that of his landlord and referable to the entry, and extended to the whole tract, although there was no extension of his actual inclosure.

—Bell v. North American Coal & Coke Co., 155 Fed. 712.....
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—*Bell v. North American Coal & Coke Co.*, 155 Fed. 712.....
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—*Pennsylvania R. Co. v. International Coal Min. Co.*, [156 Fed. 765](#).
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—*Aaron v. United States*, [155 Fed. 833](#).....[84 C. C. A. 67](#)

A defendant may assign for error the overruling of a motion to dismiss, made at the close of plaintiff's evidence, on the ground that there was no issue of fact for submission to the jury, although such motion was not renewed at the conclusion of all the evidence, where the only question in issue under the evidence was the proper construction of a written contract plain in its terms, upon which defendant's evidence had, and could have, no bearing.

—*Lydia Cotton Mills v. Prairie Cotton Co.*, [156 Fed. 225](#).....
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The question of want of mutuality in the contract on which a counterclaim is predicated is properly raised by the record; plaintiff having at the close of the evidence moved for an instructed verdict on the ground that defendant showed a failure of consideration on the part of plaintiff for the contract, and the overruling of the motion having been assigned as error, and such assignment insisted on in the brief.

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—*Sun Pub. Co. v. Lake Erie Asphalt Block Co.*, [157 Fed. 80](#).....
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§ 3. Assignment of errors.

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—Haight & Freese Co. v. Weiss, 156 Fed. 328.....84 C. C. A. 224

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—Haight & Freese Co. v. Weiss, 156 Fed. 328.....84 C. C. A. 224

§ 7. **— Discretion of lower court.**

The refusal of a court to postpone a trial because of the absence of one of a party's counsel is discretionary, and not reviewable on a writ of error.

—Sun Pub. Co. v. Lake Erie Asphalt Block Co., 157 Fed. 80.....
84 C. C. A. 584

§ 8. **— Questions of fact, verdicts, and findings.**

On a writ of error to a federal court in an action at law, where the evidence was conflicting, the verdict is conclusive in the appellate court on every question of fact embraced within the issues submitted to the jury.

—Gilmore v. McBride, 156 Fed. 464.....84 C. C. A. 274

That a verdict is against the weight of the evidence cannot be assigned as error in the federal courts.

—Sun Pub. Co. v. Lake Erie Asphalt Block Co., 157 Fed. 80.....
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—Columbia Box & Lumber Co. v. Drown, 156 Fed. 450.....
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—Gilmore v. McBride, 156 Fed. 464.....84 C. C. A. 274

§ 10. **Determination and disposition of cause—Reversal.**

Where a Circuit Court was without jurisdiction of a cause because of the absence from the complaint of necessary jurisdictional allegations, the appellate court, in reversing the judgment therein for that reason, may properly remand the cause and direct that plaintiff be permitted to amend the complaint in that respect, especially where the question of jurisdiction was not raised in the trial court.

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§ 1. Retainer and authority.

The entry of appearance for a defendant by an attorney is presumed to have been authorized, and, to relieve himself from the effect of such appearance, such defendant has the burden of proving to the satisfaction of the court that it was unauthorized.

—Aaron v. United States, 155 Fed. 833.....84 O. O. A. 67

§ 2. Compensation and lien of attorney.

In determining the reasonable value of services rendered by an attorney, it is proper to consider the value of the property in litigation, and where such property consisted of an interest in a mining claim which was recovered by the attorney for his client, in a subsequent action by him to recover for his services, evidence is admissible to show the market value

of such interest, not only when recovered, but also up to the time of trial, if still owned by defendant, as well as the amount he has actually received as his share of the proceeds of the working of the claim.

—Gilmore v. McBride, 156 Fed. 464.....84 C. C. A. 274

In an action by an attorney to recover a reasonable fee for services rendered in conducting an action, the fact that plaintiff filed a notice claiming a lien in such action is not a conclusive admission on his part that the value of his services did not exceed the sum claimed in such notice, but the question of the weight to be given to such notice as an admission is one for the exclusive determination of the jury under all the evidence in the case.

—Gilmore v. McBride, 156 Fed. 464.....84 C. C. A. 274

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Courts are indisposed to extend, by inference, the perils of an unprofitable trust; and so it is that every bailee without reward is regarded as having assumed the least responsibility consistent with his actual undertaking.

—Christian v. First Nat. Bank of Deadwood, S. D., 155 Fed. 705....
84 C. C. A. 53

BANKRUPTCY.

§ 1. Petition, adjudication, warrant, and custody of property—Involuntary proceedings.

The only issues triable in a contested bankruptcy proceeding are those of insolvency and whether the alleged act of bankruptcy has been committed, and the court is not required to deny a motion by the petitioning creditors for a dismissal of the proceeding, if satisfied that it is made in good faith, because of other issues sought to be raised by the answer and which it has no power to try.

—Bernard v. Abel, 156 Fed. 649; In re Bernard, Id...84 C. C. A. 361

An issue as to the insolvency of an alleged bankrupt involves as elements the questions of the amount of his indebtedness and the fair valuation of his property, both of which he is entitled to have determined by a jury; and the court cannot make a preliminary finding as to the validity and amount of the claims of certain creditors which will be conclusive on the jury upon the trial of such issue.

—Schloss v. A. Strellow & Co., 156 Fed. 662.....84 C. C. A. 374

An adjudication of bankruptcy on a petition charging different acts of bankruptcy, and which does not show upon which one it proceeded, does not render either charge res judicata in the further proceedings.

—In re Letson, 157 Fed. 78.....84 C. C. A. 582

§ 2. Assignment, administration, and distribution of bankrupt's estate—Preferences and transfers by bankrupt, and attachments and other liens.

To render a preferential payment received by a creditor from his debtor within four months prior to the latter's bankruptcy voidable under Bankr.

Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1905, p. 689], the bankrupt must not only have been insolvent when the payment was made, but must have intended it as a preference, and, if in fact made in the ordinary course of business, without thought of injuring other creditors and in the belief in his ability to pay them all, the creditor receiving it cannot be charged with reasonable cause to believe that a preference was intended.

—In re First Nat. Bank of Louisville, Ky., 155 Fed. 100; First Nat. Bank of Louisville, Ky., v. Holt, Id. 84 C. C. A. 16

The making of a present loan is a sufficient consideration for a transfer of collateral to secure not only such loan, but also a prior indebtedness, and, where such a transfer was made in good faith when the debtor was solvent, the right of the creditor to the securities attached at that time and collections subsequently made by it thereon and applied on the prior debt after the debtor became insolvent and within four months prior to its bankruptcy do not constitute voidable preferences.

—In re First Nat. Bank of Louisville, Ky., 155 Fed. 100; First Nat. Bank of Louisville, Ky., v. Holt, Id. 84 C. C. A. 16

Although the rights of a trustee in bankruptcy and those of an assignee in insolvency under a state statute are defined in similar language, yet a state statute making a certain transfer void as against an assignee *eo nomine* does not make it void as against a trustee in bankruptcy.

—In re Loveland, 155 Fed. 838; In re Littlefield, Id.; Putnam v. Loveland, Id. 84 C. C. A. 72

A mortgagor, after having paid a part of a mortgage debt, borrowed further sums from the mortgagee, and indorsements were made upon the mortgage note, to the effect that such sums should be added to the amount previously remaining due thereon. *Held*, that the mortgage was a valid lien in equity for the full amount of the debt as so increased as against the mortgagor's trustee in bankruptcy, whether tested by the statutes of Massachusetts as construed by its Supreme Judicial Court or by the provisions of the bankruptcy act.

—In re Loveland, 155 Fed. 838; In re Littlefield, Id.; Putnam v. Loveland, Id. 84 C. C. A. 72

A court of bankruptcy may by summary process require those who assert title to, or an interest in, property which has rightfully come into its possession and control as part of the bankrupt's estate, to present their claims to that court, and, the notice being reasonable, may proceed to adjudicate the merits of such claims.

—In re Epstein, 156 Fed. 42. 84 C. C. A. 208

While property in the course of administration under the bankruptcy act is not exempted from taxation, or freed from tax liens or claims therefore fastened upon it, it is nevertheless in custodia legis, and a pre-existing tax lien or claim cannot be converted into a full title by the procurement of a tax deed without the court's sanction.

—In re Epstein, 156 Fed. 42. 84 C. C. A. 208

A surety or indorser for a bankrupt is a creditor within the meaning of Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418].

—Kobusch v. Hand, 156 Fed. 660. 84 C. C. A. 372

Where the president of a corporation was an indorser on its notes given to a bank, and with knowledge of its insolvency and within four months prior to its bankruptcy caused it to pay the notes with intent to relieve himself from liability and to secure an advantage over other creditors, a preference was given which may be recovered from him by the trustee under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1907, p. 1031].

—Kobusch v. Hand, 156 Fed. 660. 84 C. C. A. 372

There exists no special trust relation between a bankrupt, and his creditors during the four months preceding the bankruptcy which entitles his trustee to avoid his transactions during that time on grounds other than those specified in the bankruptcy act.

—In re Letson, 157 Fed. 78.....84 C. C. A. 582

§ 3. — Administration of estate.

A court of bankruptcy has jurisdiction to order a sale of property of a bankrupt upon which a lien is asserted free from such lien, and without first determining either its validity or amount.

—In re Loveland, 155 Fed. 838; In re Littlefield, Id.; Putnam v. Loveland, Id.....84 C. C. A. 72

§ 4. — Claims against and distribution of estate.

That a claim arises as a consequence of bankruptcy is sufficient to render it provable as a fixed liability absolutely owing at the date of the filing of the petition, within the meaning of Bankr. Act 1898, § 63a (1), c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447].

—In re Neff, 157 Fed. 57.....84 C. C. A. 561

Bankruptcy is such an anticipatory breach of a contract to take and pay for stock of a corporation at a stated price and time, which time was subsequent to the bankruptcy, that a claim for damages for the breach is a provable debt.

—In re Neff, 157 Fed. 57.....84 C. C. A. 561

A bankrupt who conducted a private bank gave permission to the president of a national bank who had no account with the bankrupt to draw checks on his bank to the amount of \$25,000. These checks, by an arrangement between the two banks, were cleared through the clearing house by the national bank, which charged them to the bankrupt and credited them to the account of its president. Later the bankrupt gave his note for the amount and the president of the national bank gave to the bankrupt a corresponding note. *Held*, on the evidence, that the transaction was one for the accommodation of the president of the national bank individually, and not of his bank, and the latter was therefore entitled to prove its note against the bankrupt estate.

—Merchants' & Manufacturers' Nat. Bank of Columbus, Ohio, v. Galbraith, 157 Fed. 208.....84 C. C. A. 659

§ 5. Rights, remedies, and discharge of bankrupt.

In the absence of a local rule to the contrary, the mere use by an insolvent of nonexempt funds or assets in acquiring a homestead does not make it subject to the claims of his creditors in bankruptcy.

—In re Letson, 157 Fed. 78.....84 C. C. A. 582

§ 6. Appeal and revision of proceedings—Superintendence and revision.

The decision of a district court reversing that of a referee finding that a bankrupt was guilty of fraud in a transaction does not necessarily involve a question of law so as to be reviewable on a petition to revise, where, so far as shown by the record, there may have been a conflict of testimony as to the facts.

—In re Letson, 157 Fed. 78.....84 C. C. A. 582

§ 7. — Appeal.

An order made by a court of bankruptcy affirming an order of a referee setting aside an allowance of a secured claim, and requiring the creditor to pay to the trustee the amount of an unlawful preference, is one made in the bankruptcy proceedings proper, and is reviewable on petition for review, under Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432].

—In re First Nat. Bank of Louisville, Ky., 155 Fed. 100; First Nat. Bank of Louisville, Ky., v. Holt, Id.....84 C. C. A. 16

Where an appeal taken in a bankruptcy proceeding under Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], in-

volves only a question of law, it may be treated by the appellate court as a petition to revise.

—In *re Williams' Estate*, [156](#) Fed. 934; *Anheuser-Busch Brewing Ass'n v. Harrison*, *Id.*.....[84](#) C. C. A. [434](#)

The fact that a bankrupt accepted the benefit of an order of a referee, allowing him certain personal property exemptions, does not preclude him from appealing from a part of the same order relating to his homestead exemption.

—In *re Letson*, [157](#) Fed. [78](#).....[84](#) C. C. A. [582](#)

The [10](#) days allowed by Bankr. Act July [1](#), 1898, c. [541](#), § 25a, [30](#) Stat. [553](#) [U. S. Comp. St. 1901, p. 3432], for taking an appeal from a judgment allowing or rejecting a claim, cannot be extended by the filing of a petition for rehearing, after such time has expired, nor will an appeal lie from the ruling on such a petition which is addressed to the discretion of the court.

—*Morgan v. Benedum*, [157](#) Fed. [232](#).....[84](#) C. C. A. [675](#)

§ 8. Costs and fees.

The proceeds of property of a bankrupt, covered by valid liens and sold by the court of bankruptcy by request or consent of the lien holders, who subsequently filed their claims in such court, which were allowed as secured claims in an amount in excess of such proceeds, are properly chargeable with the costs of such court appropriate to the enforcement of the liens, but not with general costs of the administration of the estate, such as the general fees of the trustee and his attorney, or for the services of a receiver in carrying on the business of the bankrupt and his attorney, or for the expenses and losses of such business.

—In *re Williams' Estate*, [156](#) Fed. 934; *Anheuser-Busch Brewing Ass'n v. Harrison*, *Id.*.....[84](#) C. C. A. [434](#)

BANKS AND BANKING.

Following trust funds deposited in bank, see "Trusts," § 2.

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§ 1. Functions and dealings.

A bank is not chargeable with notice of fraud in the inception of a note which it discounted merely because its president had knowledge of the facts, which was gained by him in his capacity as an officer of another corporation, where he had nothing to do with the discounting of the note, and had no knowledge of it at the time.

—*McCalmont v. Lanning*, [154](#) Fed. [353](#).....[84](#) C. C. A. [138](#)

In such case the banker cannot be held to account for a sum originally advanced by the principal to the agent to be used for the purposes of the agency, and so deposited by the agent to his own credit, but which was afterwards treated by the principal as a loan to the agent, and for which his note was taken, nor for a sum lent by the banker to the agent personally, and which, having been used for agency purposes, was repaid by the principal with knowledge of the facts.

—*Harris & Co. v. Chipman*, [156](#) Fed. 929; *Chipman v. Harris & Co.*, *Id.*.....[84](#) C. C. A. [429](#)

A banker, who knowingly permitted an agent to deposit money of his principal to his own account and mingle the same with his own funds in violation of his contract, which required the deposit to be in the name of his principal, if for that reason chargeable with liability to the principal, in the absence of fraud or conspiracy, is accountable only for losses resulting directly from such wrongful deposit, such as for sums applied by the agent to his own use, and not for losses resulting from the use of the money by the agent as contemplated by the contract of agency.

—*Harris & Co. v. Chipman*, [156](#) Fed. 929; *Chipman v. Harris & Co.*, *Id.*.....[84](#) C. C. A. [429](#)

BAR

Of action by former adjudication, see "Judgment," § 3.

BAWDY HOUSE.

See "Disorderly House."

BENEFITS.

Acceptance of, as grounds of estoppel, see "Estoppel," § 1.

BILL OF REVIEW.

See "Equity," § 4.

BILLS AND NOTES.

Discounting of note by bank, see "Banks and Banking," § 1.

Requirements of statute of frauds affecting note, see "Frauds, Statute of," § 2.

BOARDS.

Of general appraisers, see "Customs Duties," § 2.

BONA FIDE PURCHASERS.

Of municipal bonds, see "Municipal Corporations," § 2.

BONDS.

County bonds, see "Counties," § 2.

General average bonds, see "Shipping," § 2.

Municipal bonds, see "Municipal Corporations," § 2.

Of county officers, see "Counties," § 1.

Of depositary, see "Depositaries."

Under revenue laws, see "Internal Revenue."

BREACH.

Of contract, see "Contracts," § 3.

BROKERS.**§ 1. Compensation and Lien.**

Where a broker, although acting as agent for both the seller and purchaser of property, is given no discretionary power to negotiate the sale, but his employment is merely to bring the principals together and to keep them informed as to the condition of the property, the dual employment is not inconsistent nor contrary to public policy, and he may receive payment from both principals.

—*McLure v. Luke*, 154 Fed. 647.....84 C. C. A. 1

§ 2. Actions for compensation.

Defendant entered into a written contract with plaintiff's intestate by which he agreed, in case he should purchase certain mining property at a stated price with the assistance of plaintiff's intestate, to pay the latter a commission. Three days after the death of the decedent a contract was executed by which defendant purchased the property with other property for slightly more than the price named. A witness also testified that on the day before the decedent's death defendant told him of the contemplated purchase, and asked him to ascertain if the decedent would not accept a sum in cash in lieu of an interest in the property which he was to receive under the commission contract. *Held*, that the contract of sale and such testimony were sufficient, *prima facie*, to establish that the decedent had performed the service that entitled him to the commission.

—*McLure v. Luke*, 154 Fed. 647.....84 C. C. A. 1

BURDEN OF PROOF.

In civil actions, see "Evidence," § 1.

CANCELLATION OF INSTRUMENTS.

See "Quietting Title."

§ 1. Right of action and defenses.

An unmarried man 77 years old, and in feeble health, deeded his farm to his nephew on the expressed consideration of §1 and other considerations, the deed reserving to the grantor a life estate. It was also orally agreed that the grantee should furnish support to the grantor at the grantee's own home, which he did so long as the grantor remained with him, and also paid the interest on a mortgage on the farm. Subsequently the grantor returned to the farm and commenced suit for cancellation of the deed. He was shown to have been mentally competent, and there was no evidence to establish coercion or undue influence. *Held*, that the fact that the deed did not impose a positive obligation on the grantee for the grantor's care and support did not authorize the court to set it aside as improvident and unconscionable.

—*McElroy v. Masterson*, 156 Fed. 36.....84 C. C. A. 202

CARGO.

See "Shipping."

CARRIERS.

Conspiracy to induce giving or receiving of rebates, see "Conspiracy," § 1.

Evidence of acts and declarations of conspirators, in prosecution for accepting rebates, see "Criminal Law," § 7.

Evidence of other offenses in prosecution for accepting rebates, see "Criminal Law," § 6.

§ 1. Control and regulation of common carriers.

The special saving clause in section 10 of the Hepburn act (Act June 29, 1906, c. 3591, 34 Stat. 595), does not mention the particular subject of the general saving clause in Rev. St. § 13 [U. S. Comp. St. 1901, p. 6], namely, the effect upon existing penalties, forfeitures, and liabilities of a repealing act, and can be accorded reasonable operation, consistently with the true intentment of its language and with the undisturbed operation of the general saving clause, by treating it as saving causes then pending in the courts of the United States from what, in its absence, and in the presence of the general saving clause, would be the effect upon them

of the amendments provided for in that act. Consequently it does not by necessary implication supersede the general saving clause or impinge upon its field of operation.

—Great Northern Ry. Co. v. United States, 155 Fed. 945.....
84 C. C. A. 93

In so far as section 1 of the Elkins act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]), provided for the punishment of acts of corporate carriers in knowingly offering, granting, or giving, as also the acts of corporate shippers in knowingly soliciting, accepting, or receiving, rebates, concessions, or discriminations from the legal rates and tariffs, it was not abrogated or repealed by the Hepburn act (Act June 29, 1906, c. 3591, 34 Stat. 584), but was preserved and continued; and in so far as it provided for the punishment of such acts, when not knowingly done—assuming, but without deciding, that it did so provide—it was repealed.

—Great Northern Ry. Co. v. United States, 155 Fed. 945.....
84 C. C. A. 93

Private tracks built by the owner of a packing plant on its own property, extending from a connection with the tracks of a belt line railroad company to and around its buildings, and used in loading cars for shipment, are not a part of the railroad system, but plant facilities, and the refunding by a railroad company, which made and published a schedule of through rates, including the belt line charge, of \$1 per car to such packing company on shipments made by it and paid for at the schedule rate, on the ground that it was a payment for the use of such private tracks, thus making the rate charged \$1 per car less than that published and charged to shippers generally from the same point, constituted the giving of a rebate, in violation of section 1 of Elkins Act February 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880].

—Chicago & A. Ry. Co. v. United States, 156 Fed. 558; *Falithorn v. Same, Id.*; *Wann v. Same, Id.*.....84 C. C. A. 324

§ 2. Carriage of passengers.

In an action for death of a passenger by the alleged negligence of a carrier's servants, evidence that plaintiff was a passenger, and that her death resulted from an accident to the train, was sufficient to establish a *prima facie* case of the carrier's negligence.

—Hopper v. Denver & R. G. R. Co., 156 Fed. 273.....84 C. C. A. 21

Three young men traveling together were passengers on a railroad train which approached Knoxville, Tenn., which was their destination, after dark. The trainmen had announced that the next station would be Knoxville, as required by the state statute, but had not called the station, when the train stopped on a narrow trestle in order to make use of a Y in turning before entering the city. The next morning the bodies of the young men were found near together under the trestle. Upon the trial of a consolidated action against the railroad company to recover for their deaths, there was evidence that they left the car together, while on the trestle, and tending to show that they fell over the edge as they stepped off. *Held*, that neither the announcement of the name of the next station nor the stopping of the train thereafter before it was reached was negligence, nor was either an invitation to passengers to alight before the station was called, which imposed on defendant the duty of warning them or rendered it liable for the deaths of plaintiffs' intestates.

—Diggs v. Louisville & N. R. Co., 156 Fed. 564; *Dunnaway v. Same, Id.*.....84 C. C. A. 330

CAUSE OF ACTION.

See "Action."

CHANCERY.

See "Equity."

CHARGE.

To jury in civil actions, see "Trial," §§ [1](#), [2](#).

To jury, in criminal prosecutions, see "Criminal Law," § [11](#).

CHARTER PARTIES.

See "Shipping," § [1](#).

CHEAT.

See "False Pretenses"; "Fraud."

CHILDREN.

Liability for death of, caused by operation of railroad, see "Railroads," § [3](#).

CHINA.

Criminal jurisdiction of United States court for China, see "Criminal Law," § [1](#).

CIRCUIT COURTS OF APPEALS.

See "Courts," § [2](#).

CITIES.

See "Municipal Corporations."

CITIZENS.

Citizenship ground of jurisdiction of United States courts, see "Courts," § [2](#);
"Removal of Causes," § [1](#).

CLAIMS.

Against estate of bankrupt, see "Bankruptcy," §§ [2](#), [4](#).

Mining claims, see "Mines and Minerals," § [1](#).

Of patent, see "Patents," § [4](#).

CLOUD ON TITLE.

See "Quieting Title."

COLLECTION.

Of taxes, see "Taxation," § [1](#).

COLLISION.

§ [1](#). **Steam vessels meeting or crossing.**

Libellant's tug Patton, coming up the Delaware river at night with a tow on her starboard side, came into collision with the tug Cahill, passing

down with a similar tow. The master of the Patton testified that shortly before the collision he saw the white towing lights of a vessel a half mile ahead of him, but seeing no side lights he was unable to tell which way it was going. He gave a signal of one whistle and ported his helm, and receiving no answer he signaled again and again, ported and still received no answer, and shortly afterwards the Patton was struck on the port bow by the tow of the Cahill. *Held*, on the evidence, that the lights seen by the Patton were not those of the Cahill, but of another tug going up the river with a car float which passed on the starboard side of the Cahill and was between her and the Patton until the latter ported; that the Patton was in fault and responsible for the collision in violating rule 3 of the Inland Navigation Rules, Act June 7, 1897, c. 4, 30 Stat. 100 [U. S. Comp. St. 1901, p. 2882], which requires a vessel when approaching another whose course she fails to understand to signify such fact by several blasts, or rule 8, which prohibits an overtaking vessel from passing without the consent of the vessel overtaken.

—*Gring v. Boyer*, 157 Fed. 220.....84 C. C. A. 668

§ 2. Lights, signals, and lookouts.

A schooner *held* in fault for a collision with a steamer in Chesapeake Bay in the night, on the ground that, while becalmed, she had been drifted around by the tide so that the steamer was an overtaking vessel, and could not see her side lights, and she failed to exhibit any white light or flare-up astern as required by the rules, although the steamer was seen approaching for a considerable time before the collision.

—*The Baltimore*, 155 Fed. 405.....84 C. C. A. 84

COLOR OF TITLE.

To sustain adverse possession, see "Adverse Possession."

COMBINATIONS.

See "Conspiracy."

COMMERCE.

Carriage of goods and passengers, see "Carriers"; "Shipping."

Conspiracy to induce giving or receiving of rebates, see "Conspiracy," § 1.

Restraining enforcement of inspection law as to interstate shipments, see "Injunction," § 1.

§ 1. Power to regulate in general.

Every corporation empowered by the state of its creation to engage in interstate commerce may carry on that commerce in sound and recognized articles of commerce in every other state in the Union. Every prohibition, obstruction, or burden which the other states attempt to impose upon such business is unconstitutional and void.

—*Butler Bros. Shoe Co. v. United States Rubber Co.*, 156 Fed. 1....
84 C. C. A. 167

Interstate commerce in sound and well-recognized articles of commerce must be free, and any prohibition, obstruction, or burden of it by a state by any method is unconstitutional. Such commerce may not be regulated by a state at all. The exclusive power to regulate commerce among the states is vested in the Congress.

—*Butler Bros. Shoe Co. v. United States Rubber Co.*, 156 Fed. 1....
84 C. C. A. 167

§ 2. Subjects of regulation.

Where a manufacturing corporation of New Jersey made annual factorage contracts with a corporation in Colorado, which latter corporation received, stored, and sold the merchandise at its expense, in consideration

of the factorage secured by it, the making of the contracts and their performance by the New Jersey corporation were transactions of interstate commerce, which could not be prohibited or trammelled by the Legislature of the state of Colorado.

—Butler Bros. Shoe Co. v. United States Rubber Co., [156 Fed. 1](#)....
[84 C. C. A. 167](#)

Every corporation of every state which is in the employ of the United States, has the right to exercise the necessary corporate powers and to transact the requisite business to discharge the duties of that employment in every other state in the Union, without let or hindrance from the latter.

—Butler Bros. Shoe Co. v. United States Rubber Co., [156 Fed. 1](#)....
[84 C. C. A. 167](#)

§ 3. Means and methods of regulation.

Where a corporation of one state is engaged in both interstate and intrastate commerce in any other state, the prohibition or the conditioning by the latter state of its exercise of its right to do business within its borders, without discriminating between that which constitutes interstate commerce and that which constitutes intrastate commerce, is unconstitutional and void, so far as it relates to the former.

—Butler Bros. Shoe Co. v. United States Rubber Co., [156 Fed. 1](#).....
[84 C. C. A. 167](#)

COMMISSIONS.

Of broker, see "Brokers," § [1](#).

COMMON CARRIERS.

See "Carriers."

COMMON LAW.

Right to literary property, see "Literary Property."

COMMUNITY PROPERTY.

See "Husband and Wife," § [1](#).

COMPENSATION.

Of attorney, see "Attorney and Client," § [2](#).

Of broker, see "Brokers," § [1](#).

COMPETENCY.

Of witnesses in general, see "Witnesses," §§ [1](#), [2](#).

COMPETITION.

Unfair competition, see "Trade-Marks and Trade-Names," § [2](#).

COMPLAINT.

In civil actions, see "Pleading," § [2](#).

In criminal prosecutions, see "Indictment and Information."

COMPROMISE AND SETTLEMENT.

See "Release."

COMPUTATION.

Of period of limitation, see "Limitation of Actions," § 1.

CONDEMNATION.

Taking property for public use, see "Eminent Domain."

CONDITIONAL SALES.

See "Sales," § 3.

CONDITIONS.

Conditional delivery of deed, see "Escrows."

In contracts and conveyances.

See "Contracts," § 2.

Contract for sale of logs, see "Logs and Logging."

Contract of sale, see "Sales," § 1.

Insurance policy, see "Insurance," § 2.

Municipal bonds, see "Municipal Corporations," § 2.

CONFIDENTIAL RELATIONS.

Disclosure of communications, see "Witnesses," § 2.

CONGRESS.

Power to regulate interstate commerce, see "Commerce," § 1.

CONSIDERATION.

Of contract in general, see "Contracts," § 1.

CONSOLIDATION.

Of actions, see "Action," § 1.

CONSPIRACY.

Commencement of period of limitations, see "Criminal Law," § 2.

Evidence of acts and declarations of conspirators, see "Criminal Law," § 7.

§ 1. Criminal responsibility.

In Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], relating to conspiracies, the words "offenses against the United States" have the same meaning as the words "offenses against the laws of the United States" in the original act of March 2, 1867 (14 Stat. 484, c. 169), the change being merely one of phraseology made by the revision commission, and such section

denounces conspiracies to commit offenses created by any of the statutes of the United States.

—Thomas v. United States, [156](#) Fed. 897; Taggart v. Same, Id.....
[84](#) C. C. A. [477](#)

A defendant may be prosecuted under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], for a conspiracy to violate a criminal or penal statute of the United States, notwithstanding the fact that the punishment prescribed for the offense created by such statute is less than that prescribed for conspiracy; the conspiracy in itself being a distinct and substantive offense.

—Thomas v. United States, [156](#) Fed. 897; Taggart v. Same, Id.....
[84](#) C. C. A. [477](#)

A conspiracy to induce the giving or receiving of rebates in violation of the Elkins act (Act Feb. [19](#), 1903, c. 708, [32](#) Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880]), is punishable under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], where the persons charged are not limited to the giver and receiver of the rebate alone.

—Thomas v. United States, [156](#) Fed. 897; Taggart v. Same, Id.....
[84](#) C. C. A. [477](#)

One who comes into a conspiracy after it has been formed, with knowledge of its existence, and with a purpose of forwarding its designs, is equally as guilty as though he had participated in its original formation.

—Thomas v. United States, [156](#) Fed. 897; Taggart v. Same, Id.....
[84](#) C. C. A. [477](#)

In an indictment under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], for a conspiracy to commit an offense against the United States, all facts necessary to constitute the conspiracy, including the overt act, must be averred with all the particularity required in criminal pleadings, but no high degree of particularity is required in describing the offense to which the conspiracy relates which is necessarily defined by the statute. So, where an indictment charged a conspiracy to induce a shipper to receive rebates from railroad companies in violation of the federal statute, it was not essential to aver the names of such railroad companies which were not known to the grand jury.

—Thomas v. United States, [156](#) Fed. 897; Taggart v. Same, Id.....
[84](#) C. C. A. [477](#)

The same rules of law and evidence govern the trial and decision of the issue whether or not a defendant jointly with others consented or agreed to the existence of a former conspiracy within the three years and the subsequent execution of it, which control the issue whether or not the conspiracy was originally formed, where that is the crucial issue.

—Ware v. United States, [154](#) Fed. [577](#).....[84](#) C. C. A. [503](#)

CONSTITUTIONAL LAW.

Provisions relating to particular subjects.

See "Commerce," § [1](#); "Corporations," §§ [2](#), [3](#); "Counties," § [2](#).

§ [1](#) Retrospective and ex post facto laws.

The amendment of such section of the statute by Act Feb. [26](#), 1903 (Laws 1903, p. [45](#), c. [32](#)), which merely changed the time when the report is required to be filed, does not render it a retrospective law, within the prohibition of Const. Mont. art. [15](#), § [13](#), as applied to debts of a corporation contracted before its enactment.

—Nelson v. Bank of Fergus County, [157](#) Fed. 161....[84](#) C. C. A. [609](#)

CONSTRUCTIVE TRUSTS.

See "Trusts," § [1](#).

CONTEMPT.

Violation of injunction, see "Injunction," § 2.

§ 1. Power to punish and proceedings therefor.

Where a party charged with contempt appears and goes to trial without objection to the sufficiency of the information and affidavits by appropriate motion, such objection is waived.

—Aaron v. United States, 155 Fed. 833.....84 C. C. A. 67

The information in a proceeding for contempt is sufficient, if it clearly apprises the defendant of the nature of the charge against him, and no particular form is essential.

—Aaron v. United States, 155 Fed. 833.....84 C. C. A. 67

CONTRACTS.

Agreements within statute of frauds, see "Frauds, Statute of."

Cancellation, see "Cancellation of Instruments."

Damages for breach as claim against bankrupt, see "Bankruptcy," § 4.

Parol or extrinsic evidence, see "Evidence," § 4.

Subrogation to rights or remedies of creditors, see "Subrogation."

Contracts of particular classes of persons.

See "Master and Servant."

Contracts relating to particular subjects.

See "Mines and Minerals," § 2.

Sale of logs, see "Logs and Logging."

Particular classes of express contracts.

See "Ballment"; "Depositories"; "Insurance"; "Mortgages"; "Partnership"; "Sales."

Charter parties, see "Shipping," § 1.

Employment, see "Master and Servant."

Leases, see "Landlord and Tenant."

Particular modes of discharging contracts.

See "Release."

§ 1. Requisites and validity.

There is want of mutuality, necessary for a valid contract, where plaintiff, the manufacturer of a certain cigar, offered to sell in the future to defendant, a cigar dealer, as many of such brand as he might desire for his wants, and to continue to do so during the life of the brand, as long as defendant cared to sell them.

—A. Santaella & Co. v. Otto F. Lange Co., 155 Fed. 719.....
84 C. C. A. 145

An agreement to procure qualified citizens to enter lands under the general homestead law and to grant their use to another until they should make final proof or dispose of their holdings, without the reservation of any part of this use for the residence thereon or the cultivation thereof by the entrymen, is inconsistent with the purpose and spirit and violative of the terms of the law, although no contract is made regarding the disposition of the title which may be obtained.

—Ware v. United States, 154 Fed. 577.....84 C. C. A. 503

§ 2. Construction and operation.

When a contract is fairly open to two constructions, it is legitimate to adopt the one which equity would favor.

—*Christian v. First Nat. Bank of Deadwood, S. D.*, [155 Fed. 705](#)....
[84 C. C. A. 53](#)

If there be doubt as to the true meaning of a written contract, and one of the parties be responsible for the terms employed, it is both just and reasonable that it should be construed most strongly against that party.

—*Christian v. First Nat. Bank of Deadwood, S. D.*, [155 Fed. 705](#)....
[84 C. C. A. 53](#)

As a general proposition, where the issue is one of fact as to the performance of a contract, it is the province of the jury to pass upon it; but, before the question of compliance or noncompliance arises, there must be a determination of the terms of the contract itself, and where it is in writing showing the whole of the agreement, and its terms are capable of intelligent interpretation, its construction is for the court, and not for the jury.

—*Lydia Cotton Mills v. Prairie Cotton Co.*, [156 Fed. 225](#).....
[84 C. C. A. 129](#)

The question whether the performance of a stipulation in a contract is a condition precedent to the performance of other stipulations in it depends upon the order in which the parties intend the several stipulations to be performed. The calling of a provision or stipulation a condition is not conclusive, and if from the contract or other circumstances it is seen that it was not the intention of the parties that its performance should be a condition precedent it will not be held to be such.

—*Quinlan v. Green County, Ky.*, [157 Fed. 33](#).....[84 O. C. A. 537](#)

§ 3. Performance or breach.

Defendant and others, as members of a syndicate, contemplating the formation of a corporation to sell an enamel paint, entered into a contract with plaintiff to manufacture the same. The contract recited that it was assumed that the product could be made with the plant and equipment then in use by plaintiff, but provided that, if the development of the business showed that additional equipment and machinery were required, the members of the syndicate should provide satisfactory security for the necessary outlay. After the enamel company was formed and the syndicate merged therein, it was found that a new plant would be required to make the enamel, and plaintiff entered into a contract with the company to erect the plant at the company's cost. *Held*, that the money expended in such erection was not under the syndicate contract, but under that with the corporation, and that defendant could not be held liable therefor.

—*Patton Paint Co. v. Lloyd*, [156 Fed. 770](#).....[84 C. C. A. 350](#)

CONTRIBUTORY NEGLIGENCE.

As question for jury, see "Negligence," [§ 2](#).

Of person killed by operation of railroad, see "Railroads," [§§ 1, 2](#).

Of servant, see "Master and Servant," [§§ 4, 5](#).

CONVEYANCES.

See "Mortgages."

By or to receivers, see "Receivers," [§ 1](#).

COPYRIGHTS.

See "Literary Property."

§ 1. Nature and acquisition.

But a single valid copyright can be obtained upon the same subject-matter; and an artist by depositing the name and description of a painting in the prescribed office did not acquire a copyright thereon, where he had previously deposited a photograph of the same painting under a different name and description for the purpose of obtaining a copyright, unless it is shown by proof that such prior deposit was inoperative.

—*Calliga v. Inter Ocean Newspaper Co.*, 157 Fed. 186.....
84 C. C. A. 634

§ 2. Infringement.

Strict construction and proof are required in an action under Rev. St. § 4965 [U. S. Comp. St. 1901, p. 3414], to recover the penalty thereby authorized for infringement of a copyright.

—*Caliga v. Inter Ocean Newspaper Co.*, 157 Fed. 186. .84 C. C. A. 634

CORPORATIONS.

Burden of proof in action by corporation against agent, see "Evidence," § 1.

Exercise of power of eminent domain, see "Eminent Domain," § 1.

Pleading in suit against corporation to cancel release, see "Equity," § 3.

Regulation of corporations engaged in interstate commerce, see "Commerce," §§ 1, 2.

Right of corporations to maintain suits in United States courts, see "Courts," § 2.

Right of corporations to remove suits to United States court, see "Removal of Causes," § 1.

Particular classes of corporations.

See "Municipal Corporations"; "Railroads."

Insurance companies, see "Insurance."

§ 1. Capital, stock, and dividends.

The acceptance by defendant of a written offer by plaintiffs, who were brokers, to sell certain stock and bonds of a railroad company, which offer was expressly stated therein to be made by authority of a third person named who controlled such stock and bonds, did not create a contract of sale between plaintiffs and defendant which would support an action by plaintiffs on defendant's refusal to accept and pay for the securities from them, and its purchase of the same direct from their principal.

—*Mason v. Chicago, B. & Q. Ry. Co.*, 156 Fed. 959. . . .84 C. C. A. 459

§ 2. Insolvency and receivers.

Limitation does not begin to run in favor of a stockholder against an action to enforce an assessment made against him under such constitutional provision until the entry of the decree fixing the amount of such assessment.

—*Goss v. Carter*, 156 Fed. 746.....84 C. C. A. 402

Under Neb. Const. art. 11b, § 7, which provides that every stockholder in a banking corporation shall be individually liable to its creditors over and above the amount of his stock to an amount equal to his stock, which, as construed by the Supreme Court of the state, is self-executing and enforceable only after the assets of the corporation have been exhausted, by means of a suit in equity in behalf of all creditors against the corporation and its stockholders, in which all equities shall be adjusted, the total liabilities of the corporation ascertained, and a receiver or trustee appointed to collect from each stockholder his pro rata share of such liabilities,

the amount due from the stockholders when so ascertained constitutes a trust fund, the legal title to which is vested in the receiver or trustee appointed, and he may maintain an action to recover the amount due from a stockholder in a foreign jurisdiction.

—Goss v. Carter, [156 Fed. 746](#).....[84 C. C. A. 402](#)

In such an equity suit, each stockholder is represented by the corporation, having contracted with reference thereto, and is bound by the decree therein, although a nonresident of the state and not personally served with process.

—Goss v. Carter, [156 Fed. 746](#).....[84 C. C. A. 402](#)

§ 3. Foreign corporations.

Where a New Jersey corporation entered into a factorage contract with a corporation in Colorado, the Colorado corporation ordering, receiving, storing, and selling merchandise of the New Jersey corporation at its own expense in consideration of the factorage secured to it by the contract, the New Jersey corporation was not doing business in Colorado within the meaning of the Constitution and statutes of that state.

—Butler Bros. Shoe Co. v. United States Rubber Co., [156 Fed. 1](#)....
[84 C. C. A. 167](#)

A foreign corporation, which has no warehouse, office, or place of business, and which neither incurs nor pays any of the expenses of receiving, handling, storing, or selling its goods, in a state to which it consigns them to its factor, who conducts all the business there, assumes and pays all the expenses of receiving, selling, handling, and storing the goods, is not doing business in the latter state within the true meaning of the statutes relative to the admission of foreign corporations.

—Butler Bros. Shoe Co. v. United States Rubber Co., [156 Fed. 1](#)....
[84 C. C. A. 167](#)

Const. Colo. art. [15](#), § [10](#), 1 Mills' Ann. St. §§ [499](#), [500](#), Sess. Laws 1901, p. [121](#), c. [52](#), § [10](#), and Sess. Laws 1902, p. [73](#), c. [31](#), § [64](#), prohibit every foreign corporation from doing any business or exercising any corporate powers, or prosecuting or defending any suits except by payment of an annual license fee, and provide that failure to pay the same shall be a defense to all actions brought in any court within the state on a transaction growing out of such business. *Held*, that as a literal interpretation of this legislation would render it unconstitutional in so far as it prohibits or conditions the exercise by a foreign corporation of its right to carry on interstate commerce in Colorado, or limits the exercise in that state by a foreign corporation of its right to institute and defend in the federal courts suits arising out of that commerce, the true construction of the legislation is that it was intended to govern intrastate commerce and suits in the state courts in Colorado only, and was inapplicable to interstate commerce in that state and to the right of a foreign corporation to institute and defend suits in the federal courts.

—Butler Bros. Shoe Co. v. United States Rubber Co., [156 Fed. 1](#)....
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Civ. Code Mont. § [451](#), as amended by Act Feb. [26](#), [1903](#) (Laws 1903, p. [45](#), c. [32](#)) providing that "every corporation having a capital stock" shall annually, and within [20](#) days from and after the 31st day of December, make a report, which shall state the amount of its authorized capital, and what portion has been paid, and the amount of its debts, and that, if any such corporation shall fail to make such report, its directors shall be jointly and severally liable for all debts of the corporation then existing or which may be thereafter contracted until such report shall be made and filed, being general in its language and having been changed into its present form after the adoption of the state Constitution, article [15](#), § [11](#), of which provides that no foreign corporation "shall have or be allowed to exercise or enjoy within this state any greater rights or privileges" than those possessed or enjoyed by domestic corporations, applies alike to domestic and foreign corporations doing business within the state, and the failure of such a foreign corporation to make the required

report renders its directors liable for the existing debts of the corporation.

—Nelson v. Bank of Fergus County, 157 Fed. 161...84 C. C. A. 609

CORRECTION.

Of judgment, see "Judgment," § 1.

COSTS.

In bankruptcy, see "Bankruptcy," § 8.

COUNTIES.

See "Municipal Corporations."

§ 1. Government and officers.

A deputy county auditor in Minnesota, authorized by law to act in the name of his principal and for whose official acts the auditor and his bondsmen were responsible, not only to the county, but to any person injured by his "misconduct in office" (Gen. St. Minn. 1894, §§ 710, 5951), issued spurious refund orders on the county treasurer in favor of fictitious payees, purporting to be for the refunding of taxes received through redemption from tax sales. He procured the orders to be authenticated by the chairman of the board of county commissioners, forged the names of the fictitious payees to assignments thereof, and sold the same to a bank. *Held*, that any loss sustained by the bank through its purchase of the orders could not be attributed to the official misconduct of the deputy in issuing the same, but that its proximate cause was his individual acts in forging the assignments and selling the orders as genuine; that, the orders being nonnegotiable, the bank was put on inquiry, and acquired no greater rights than the supposed payees, and had no claim to recover any such loss, either from the county or the surety on the auditor's bond.

—National Surety Co. v. State Sav. Bank, 156 Fed. 21.....
84 C. C. A. 187

§ 2. Fiscal management, public debt, securities, and taxation.

Const. Ill. 1870, art. 9, § 12, which limits the amount of indebtedness which may be lawfully contracted by any municipality to 5 per cent. of the value of the taxable property therein, relates solely to the creation of indebtedness thereafter, and neither authorizes repudiation, nor affects the making of terms for payment of existing legal liabilities; hence the funding of such liabilities by a county, authorized by statute and vote, was unaffected by the limitation, and the fact alone that funding bonds issued for that purpose, reciting that "binding, subsisting legal obligations of said county" were thereby funded exceeded such limitation, neither implies nor amounts to a violation of the constitutional provision which can only be made to appear by impeaching such recital as to the validity of the indebtedness funded.

—Hamilton County v. Montpelier Sav. Bank & Trust Co., 157 Fed. 19
84 C. C. A. 523

Rev. St. Ill. 1881, c. 113, authorizes counties and other municipalities to issue bonds for the purpose of retiring outstanding obligations. A county had an outstanding issue of bonds. After years of litigation in both state and federal courts the liability of the county was established in favor of the holders of a majority of such bonds, and judgments entered against it thereon, while other portions of the issue had been adjudged invalid, and the holders defeated. Others of the bonds were in the hands of holders whose rights had not been adjudicated. In such state of facts a compromise was effected, pursuant to which the county voted to is-

sue funding bonds under such statute, to be used in settlement of the judgments and the outstanding unadjudicated bonds, and they were so used: judgments being entered on the unadjudicated bonds by consent, and all judgments satisfied in exchange for the funding bonds. Such bonds recited that they were issued under such statute, and that "binding, subsisting legal obligations of said county" were thereby funded. *Held* that, under the statute, the county officers, authorized thereto by a vote of the electors, had power to make the compromise, and for that purpose to determine on behalf of the county that the unadjudicated outstanding bonds were valid and subsisting obligations, and that their recital of such fact estopped the county as against a bona fide holder for value of the funding bonds to deny their validity, on the ground that all or any part of the obligations thereby retired were invalid, either on constitutional or statutory grounds.

—Hamilton County v. Montpelier Sav. Bank & Trust Co., [157 Fed. 19](#) [84 C. C. A. 523](#)

A judge of a county court in Kentucky, acting under statutory authority, called a special election to determine whether or not the county should subscribe for a certain amount of the stock of a railroad company and issue its negotiable bonds for the amount, the subscription to be subject to certain stated conditions, one of which was that it should not be made nor the bonds issued "until said county . . . is fully and completely exonerated from the payment of the capital stock voted by said county and authorized to be subscribed" to another railroad company. The proposition having been carried, the judge subsequently entered an order reciting that, "the court being sufficiently advised," the bonds should issue, and they were thereupon issued and delivered, and the stock received by the county. At that time some years had elapsed since the county voted to subscribe to the stock of the other railroad company, and the clerk had been authorized to make the subscription, but no further steps had been taken to that end. *Held*, in an action against the county by a bona fide holder of bonds so issued, that the presumption arising from the subscription and issuance of the bonds, and the order of the judge authorizing the same, the condition precedent had been fulfilled, and the county exonerated from liability on account of its prior subscription was not overcome but was strengthened, where, although more than [30](#) years had elapsed, no contract completing such subscription had ever been made or demanded.

—Quinlan v. Green County, Ky., [157 Fed. 33](#) [84 C. C. A. 537](#)

COURTS.

Bankruptcy courts, see "Bankruptcy," §§ [2](#), [3](#).

Contempt of court, see "Contempt."

Criminal jurisdiction, see "Criminal Law," § [1](#).

Mandamus to inferior courts, see "Mandamus," § [1](#).

Removal of action from state court to United States court, see "Removal of Causes."

Review of decisions, see "Appeal and Error."

§ [1](#). Establishment, organization, and procedure in general.

In accordance with the practice in this circuit to follow the decisions of other Circuit Courts of Appeals whenever they may properly form a precedent, *Eidman v. Tilghman*, [136 Fed. 141](#), is followed on a question of the construction of the statutes with reference to the war revenue tax on legacies.

—Gill v. Austin, [157 Fed. 234](#) [84 C. C. A. 677](#)

§ [2](#). United States courts.

A Circuit Court of Appeals of the United States has no power to interfere by mandamus with the action of a Circuit Court, where the question involved relates to its jurisdiction as a Circuit Court of the United States,

[84 C.C.A.—45](#)

but the application in such case must be made to the Supreme Court; but such want of power in the Circuit Court of Appeals does not exist where the question involved relates to the jurisdiction of a Circuit Court as a judicial tribunal of original jurisdiction, having no relation to its limitation as a national court.

—*Dowagiac Mfg. Co. v. McSherry Mfg. Co.*, 155 Fed. 524.....
84 C. C. A. 38

When the jurisdiction of a federal court depends upon the case being one arising under the Constitution or laws of the United States, the facts necessary to make such a case must be plainly shown upon the record, and it is not enough that such question may arise.

—*City of Louisville v. Cumberland Telephone & Telegraph Co.*, 155 Fed. 725.....84 C. C. A. 151

A federal court is without jurisdiction of a suit to enjoin the enforcement of a municipal ordinance, on the ground that it impairs the obligation of a contract or deprives complainant of property without due process of law, in violation of the Constitution of the United States, when the bill alleges that no power had been granted to the municipality by the Constitution or Legislature of the state to pass such ordinance; the prohibition of the federal constitution being against state action only.

—*City of Louisville v. Cumberland Telephone & Telegraph Co.*, 155 Fed. 725.....84 C. C. A. 151

Every corporation of every state has the absolute right to institute, maintain, and defend in the federal courts its suits in any other states in the cases and on the terms prescribed by the acts of Congress.

—*Butler Bros. Shoe Co. v. United States Rubber Co.*, 156 Fed. 1.....
84 C. C. A. 167

While the national courts may enforce rights created and remedies granted by state statutes according to their terms, the jurisdiction and power of those courts was not granted by, and it may not be revoked, annulled, or impaired by, state legislation.

—*Butler Bros. Shoe Co. v. United States Rubber Co.*, 156 Fed. 1...
84 C. C. A. 167

It is settled law that for purposes of the jurisdiction of a federal court a corporation is a citizen only of the state in which it is incorporated; and, where it is doing business and has an established office in another state, such fact does not affect its citizenship, but it may be there sued in such court by a citizen of the state residing in the district.

—*Haight & Freese Co. v. Weiss*, 156 Fed. 328.....84 C. C. A. 224

A Circuit Court of Appeals is bound to inquire, first, as to its own jurisdiction of a cause brought before it by appeal or writ of error, and, second, as to the jurisdiction of the court from which the record comes, even though the question is not raised by the parties.

—*Puget Sound Nav. Co. v. Lavendar*, 156 Fed. 361....84 C. C. A. 259

The construction of a statute of a state by its highest court will be followed by the federal courts; but, where such highest court is composed of a number of judges, a construction placed upon a statute by the opinion of one judge which is not concurred in by a majority is not so binding, but leaves the question to be determined independently by a federal court.

—*San Jose-Los Gatos Interurban Ry. Co. v. San Jose Ry. Co.*, 156 Fed. 455.....84 C. C. A. 265

Where the power of a Circuit Court of the United States to proceed to the trial of an action against a nonresident defendant depends on whether there has been a general appearance by defendant, or, if not, upon the validity of attachments and garnishments of property within the district, both such questions are jurisdictional, and a decision of the court determining them in favor of the defendant and dismissing the action for want of jurisdiction is reviewable only by the Supreme Court under sections

5 and **6** of the Circuit Court of Appeals act of March **3**, 1891 (26 Stat. 827, 828, c. **517** [U. S. Comp. St. 1901, pp. **549**, **550**]).

—Davis v. Cleveland, C., C. & St. L. Ry. Co., **156** Fed. 775.....**84** C. C. A. **453**

In the federal courts, the rule subsists that the distinction between legal and equitable defenses is always recognized, and such rule cannot be affected by state legislation or practice permitting equitable defenses in actions at law.

—Pacific Mut. Life Ins. Co. of California v. Webb, **157** Fed. **155**...
84 C. C. A. **603**

COVERTURE.

See "Husband and Wife."

CREDIBILITY.

Of witness, see "Witnesses," § **3**.

CREDITORS.

See "Bankruptcy."

Subrogation to rights of creditor, see "Subrogation."

CRIMINAL LAW.

Indictment, information, or complaint, see "Indictment and Information."

Particular offenses.

See "Conspiracy," § **1**; "Contempt"; "Disorderly House"; "False Pretenses"; "Larceny"; "Perjury."

Against postal laws, see "Post Office," § **1**.

§ **1. Jurisdiction.**

A District Court of the United States has jurisdiction of a prosecution under Rev. St. § 5395 [U. S. Comp. St. 1901, p. 3654], for false swearing in a naturalization proceeding, notwithstanding the fact that such proceeding was in a state court.

—Holmgren v. United States, **156** Fed. **439**.....**84** C. C. A. **301**

The object of Act June **30**, 1906, c. 3934, **34** Stat. 814 [U. S. Comp. St. Supp. 1907, p. 797], creating the United States Court for China, and of the treaty under which it was created, in so far as that court is given criminal jurisdiction, was to secure to American citizens residing or sojourning in China and there charged with crime the benefit of the principles of the laws of the United States relating to the trial of persons accused of crime; but the statute at the same time makes such citizens subject to punishment for acts made criminal by any law of the United States or for acts recognized as crimes by the common law.

—Biddle v. United States, **156** Fed. **759**.....**84** C. C. A. **415**

The provisions of such statute, making the common law applicable to criminal offenses committed by American citizens in China, are to be construed as referring to the common law in force in the several American colonies at the time of their separation from England, and this included not only the ancient common or unwritten law, but also statutes which had theretofore been passed amendatory of or in aid of the common law, among which was St. **30** Geo. II, c. **24**, enacted in 1757, creating the offense of obtaining money or goods under false pretenses, and the subsequent amendments thereto.

—Biddle v. United States, **156** Fed. **759**.....**84** C. C. A. **415**

In view of the legislation of Congress making the obtaining of money or property by false pretenses a crime in Alaska and the District of Columbia and in other territory subject to the criminal jurisdiction of the United States, such act is an offense against the laws of the United States, within the meaning of Act June 30, 1906, c. 3934, 34 Stat. 814 [U. S. Comp. St. Supp. 1907, p. 797], conferring jurisdiction upon the United States Court for China, and an American citizen guilty of the commission of such act in China is subject to trial and punishment therefor by that court.

—Biddle v. United States, 156 Fed. 759.....84 C. C. A. 415

§ 2. Limitation of prosecutions.

Where a conspiracy has been formed and an overt act has been done in execution of it more than three years before the filing of an indictment, a prosecution for that conspiracy and overt act is barred by the statute of limitations.

—Ware v. United States, 154 Fed. 577.....84 C. C. A. 503

When in such a case subsequent overt acts are committed under the old conspiracy within the three years, the existence of the conspiracy and the conscious participation of the defendant therein within the three years are indispensable to the maintenance of a prosecution for the conspiracy. But if these facts are established by competent evidence such a prosecution may be sustained.

—Ware v. United States, 154 Fed. 577.....84 C. C. A. 503

Proof of the formation by the defendant and others, more than three years before the indictment, of such a conspiracy as that charged in the indictment and of an overt act thereunder prior to the three years, is insufficient to sustain the charge of a conspiracy within the three years. But, in connection with evidence allunde of the existence of the conspiracy and of the defendant's conscious participation in it within the three years, it is competent evidence for the consideration of the jury in determining the issue presented by the indictment.

—Ware v. United States, 154 Fed. 577.....84 C. C. A. 503

An overt act committed by one of the alleged co-conspirators within the three years pursuant to a conspiracy between him and the defendant, formed and followed by an overt act more than three years prior to the filing of the indictment without the defendant's consent or agreement within the three years to the continued existence and execution of the conspiracy, is incompetent to establish its existence and his participation therein within the three years.

—Ware v. United States, 154 Fed. 577.....84 C. C. A. 503

§ 3. Former jeopardy.

The acquittal of defendants on one of two indictments consolidated for the purpose of trial is not a bar to a conviction on the other where the offenses charged are distinct in point of law, although the same facts may have been relied on to a great extent in each case.

—Thomas v. United States, 156 Fed. 897; Taggart v. Same, Id.....
84 C. C. A. 477

§ 4. Arraignment and pleas, and nolle prosequi or discontinuance.

Objection to the overruling or striking out of a plea of misnomer is waived by the subsequent filing of a demurrer to the indictment.

—Lee v. United States, 156 Fed. 948.....84 C. C. A. 448

A defendant cannot interpose a plea of misnomer after having challenged the sufficiency of the indictment by a motion to quash.

—Lee v. United States, 156 Fed. 948.....84 C. C. A. 448

§ 5. Evidence—Judicial notice, presumptions, and burden of proof.

A general regulation promulgated by the General Land Office respecting homestead entries of public land, for the government of the officers of local land offices, pursuant to authority given by Rev. St. § 2478 [U.

S. Comp. St. 1901, p. 1586], becomes a part of the body of public laws of which the courts take judicial notice.

—Nurnberger v. United States, [156 Fed. 721](#).....[84 C. C. A. 377](#)

§ 6. — Other offenses, and character of accused.

On the trial of defendants charged with having conspired with a person named and with others to the grand jurors unknown to induce a partnership to accept rebates from railroad companies, evidence of contemporaneous contracts made by defendants with other large shippers, similar in all respects to that made with the partnership named, and that such shippers also received sums of money indirectly which they understood to come from defendants, and to be in fact rebates, was admissible on the question of intent and motive in the transaction charged in the indictment.

—Thomas v. United States, [156 Fed. 897](#); Taggart v. Same, Id.
[84 C. C. A. 477](#)

§ 7. — Acts and declarations of conspirators and codefendants.

On the trial of defendants charged with having conspired with a person named and with others to the grand jurors unknown to induce a partnership to accept rebates from railroad companies on shipments in violation of the interstate commerce law, where there was evidence tending to establish the conspiracy, and that the arrangement for the illegal rebates was made between defendants and one member of such partnership, entries in a private memorandum book kept by such partner, showing sums received as "freight commissions" and distributed between the partners individually, which transactions did not appear on the books of the firm, were admissible in evidence.

—Thomas v. United States, [156 Fed. 897](#); Taggart v. Same, Id.
[84 C. C. A. 477](#)

§ 8. — Documentary evidence and exclusion of parol evidence thereby.

Where a general regulation promulgated by the General Land Office respecting homestead entries of public land, for the government of the officers of local land offices, is pertinent to the issue as to the criminal intent of a defendant charged with a criminal offense under the land laws, as corroborating his testimony as to his understanding of the requirement of the law, by showing that such understanding was in accordance with that of the Land Department until after the alleged offense, he was entitled to have such regulation placed before the jury as a matter of evidence, and its exclusion was error.

—Nurnberger v. United States, [156 Fed. 721](#).....[84 C. C. A. 377](#)

§ 9. — Testimony of accomplices and codefendants.

On the trial of a defendant charged with perjury in giving false testimony in a proceeding for naturalization of an alien, the applicant for citizenship is not an accomplice in such sense as to require the jury to be cautioned in respect to his testimony, where it does not appear that defendant gave the false testimony at the instigation of such applicant.

—Holmgren v. United States, [156 Fed. 439](#).....[84 C. C. A. 301](#)

§ 10. Trial—Province of court and jury in general.

The evidence in every criminal case should be sufficient to warrant a reasonable conclusion of the defendant's guilt, otherwise it is the duty of the court to instruct a verdict in his favor.

—Mickle v. United States, [157 Fed. 229](#).....[84 C. C. A. 672](#)

§ 11. — Necessity, requisites, and sufficiency of instructions.

In a criminal case, the refusal of a requested instruction that defendant is presumed innocent, and that such presumption remains until overcome by the proof, is reversible error, notwithstanding the giving of a proper instruction on the subject of reasonable doubt.

—Thomas v. United States, [156 Fed. 897](#); Taggart v. Same, Id.
[84 C. C. A. 477](#)

§ 12. Appeal and error, and certiorari—Presentation and reservation in lower court of grounds of review.

An assignment of error in a criminal case, based upon the fact that the jury were permitted to take with them to their room the indictment, on which was indorsed the verdict of the jury on a former trial finding the defendant guilty, cannot be considered by the appellate court, where the matter was not brought to the attention of the trial court until after the verdict was returned.

—Holmgren v. United States, 156 Fed. 439.....84 C. C. A. 301

Where evidence is admitted in the course of the trial for certain purposes, an exception to a paragraph in the charge of the court, which declares that this evidence was properly admitted for these purposes, in the absence of any request to the court to exclude any specific evidence or to limit its effect, and in the absence of any objection or exception to its admission, and in the absence of any specification of the particular evidence challenged, is unavailing, because in such a case the record fails to prove the error, and the presumption that the action of the court below was right must prevail.

—Ware v. United States, 154 Fed. 577.....84 C. C. A. 503

§ 13. — Review.

A judgment of conviction in a criminal case will not be reversed by an appellate court because of the overruling of a motion for a new trial based upon the ground that the jury took to their room the indictment, on which was recorded a former conviction of defendant, where such motion and the supporting affidavits were considered and passed upon by the trial court.

—Holmgren v. United States, 156 Fed. 439.....84 C. C. A. 301

While the permitting of leading questions is a matter resting in the sound discretion of the trial court, allowing a district attorney in a criminal case to ask questions of his own witnesses, who are not unwilling or unfriendly, which are leading and in a form to suggest the answer desired and call for a mere conclusion of the witness, is an abuse of discretion, and is prejudicial error.

—Nurnberger v. United States, 156 Fed. 721.....84 C. C. A. 377

CUSTODY.

Of children in suit for divorce, see "Divorce," § 1.

CUSTOMS DUTIES.

§ 1. Goods subject to duty, rate, and amount.

In Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 391, 30 Stat. 187 [U. S. Comp. St. 1901, p. 1670], the proviso that "all manufactures of which wool is a component material, shall be classified and assessed for duty as manufactures of wool," is not limited to the goods containing silk which are the subject of said paragraph, but extends to all silk and wool goods; and dress goods in chief value of silk, but in part of wool, become by virtue of this proviso subject to the duty on wool goods, rather than that on silks.

—United States v. Scruggs, Vandervoort & Barney Dry Goods Co., 156 Fed. 940.....84 C. C. A. 440

Of the provisions in Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 88, 30 Stat. 155 [U. S. Comp. St. 1901, p. 1632], (1) for "tiles, plain unglazed, one color, exceeding two square inches in size," and (2) for "tiles * * * semi-vitrified, flint," etc., the latter is more specific; and tiles embraced in both descriptions are dutiable under the latter.

—Schroeder v. United States, 156 Fed. 957; Engelhard v. Same, Id., 84 C. C. A. 457

Iron castings, which by careful additional work have been fitted as parts of machines, are no longer dutiable as "castings," under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 148, 30 Stat. 162 [U. S. Comp. St. 1901, p. 1640], but have been advanced to the condition of "articles * * * of iron * * * partly * * * manufactured," under paragraph 193, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645].

—John Bromley & Sons v. United States, 156 Fed. 958.....
84 C. C. A. 458

§ 2. Entry and appraisal of goods, bonds, and warehouses.

For the purpose of ascertaining the date for filing protests, Importers are bound to take notice of the dates given in the liquidation bulletin publicly posted as prescribed by the customs regulations; and, in case of conflict between the bulletin and notations on the entry, they should be governed by the former.

—United States v. Charles H. Wyman & Co., 156 Fed. 97.....
84 C. C. A. 123

Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933], permitting protests against decisions of collectors of customs to be filed "within ten days after but not before" liquidation of the entries, fixes definitely the time within which a protest must be filed; and, if not filed within this period, a protest is invalid.

—United States v. Charles H. Wyman & Co., 156 Fed. 97.....
84 C. C. A. 123

By a customhouse error the date of liquidation was stated in an entry as being later than it was in fact, and a representative of the importer was thereby misled; but the correct date was given in both a notice sent to the importer and the liquidation bulletin posted for inspection by importers. *Held*, that the error did not have the effect of extending the period for filing protests, prescribed by Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933].

—United States v. Charles H. Wyman & Co., 156 Fed. 97.....
84 C. C. A. 123

The classification by a collector of customs of imported goods under a tariff law is presumably correct.

—Vandiver v. United States, 156 Fed. 961.....84 C. C. A. 522

Findings of the Board of General Appraisers, unless unsupported or against the weight of evidence, or additional evidence has been taken, will not be disturbed by the courts on appeal.

—Vandiver v. United States, 156 Fed. 961.....84 C. C. A. 522

DAMAGES.

§ 1. Pleading, evidence, and assessment.

In an action by a servant employed as a car repairer to recover from the master for a personal injury, where it was shown that he was a carpenter by trade, on the question of damages, evidence of his disability caused by the injury was not limited to the effect on his earning capacity as a car repairer, but it was competent to show the effect on his capacity to earn wages as a carpenter.

—Northern Pac. Ry. Co. v. Wendel, 156 Fed. 336.....84 C. C. A. 232

Under a declaration, in an action for personal injury, which describes the wounds received by plaintiff, evidence is admissible, under the settled rules stated in Chitty on Pleading, 411-414, with respect to injuries not described, but which naturally resulted from such wounds, as affecting the amount of damages recoverable.

—Katahdin Pulp & Paper Co. v. Peltomaa, 156 Fed. 342.....
84 C. C. A. 238

DEATH.

Liability for death caused by operation of railroad, see "Railroads," §§ 1-3.
Liability of carrier for death of passenger, see "Carriers," § 2.

§ 1. Actions for causing death.

When decedent, an unmarried female 19 years of age at the time of her death, was two years old, her mother died, and she was taken by plaintiff, her father, to reside with her aunt, with whom she lived until she was 16, when she was sent by him to school to fit herself for teaching. She was sympathetic, ambitious, industrious, of good health, and fond of her father, who paid the expenses incident to her education, and desired to keep house for him, but he, being a farm laborer and traveling machinist, had not married again, and at the time of his daughter's death was 60 years of age. *Held*, that evidence of these facts, in the light of the natural influence or promptings of filial ties, was sufficient to sustain a finding that there was a reasonable expectation of substantial, though not large, pecuniary benefit to the father from a continuance of the life of the daughter.

—Hopper v. Denver & R. G. R. Co., 155 Fed. 273. . . . 84 C. C. A. 21

Mills' Ann. St. Colo. § 1508, creates an action for death negligently caused by a public carrier, and declares that it shall forfeit for every person and passenger so injured or killed not more than \$5,000, nor less than \$3,000, which may be sued for and recovered: (1) By the husband or wife of deceased; or (2) if there be no husband or wife, or he or she fail to sue within a year after such death, then by the heir or heirs of the deceased, or, if the deceased be a "minor or unmarried," then by the father and mother, or, if either of them be dead, then by the survivor. *Held* that, if the deceased left a husband or wife, the sole right of action was in such survivor, save that as against children the right would be lost unless asserted within a year; if there was no surviving husband or wife, or the survivor failed to sue within a year, then the sole right would be in the children; and if there was neither surviving husband nor wife nor any children, then only would the right of action be in the father and mother, or the survivor; so that where an unmarried adult female is killed by the negligence of a carrier, and she leaves neither husband, child, nor mother, the right of action is in her surviving father.

—Hopper v. Denver & R. G. R. Co., 155 Fed. 273. . . . 84 C. C. A. 21

DEBT, ACTION OF.

For recovery of stamp taxes, see "Internal Revenue."

DEBTOR AND CREDITOR.

See "Bankruptcy."

DECEIT.

See "Fraud."

DECLARATION.

In pleading, see "Pleading," § 2.

DEEDS.

Cancellation, see "Cancellation of Instruments."

Of trust, see "Mortgages."

Receivers' deeds, see "Receivers," § 1.

DELAY.

Laches, see "Equity," § 2.

DELIVERY.

Of deed, see "Escrows."

DEPOSITARIES.

Of deeds delivered as escrow, see "Escrows."

Plaintiff was elected head banker of the Modern Woodmen of America, an incorporated fraternal society, and as such became custodian of its funds. As required by the by-laws, he gave a bond for the faithful performance of his duties, among which was the depositing of all money in depositories, selected by him but approved by the directors of the society. He was authorized to transfer funds from one depository to another, but not to withdraw them for any other purpose except upon checks, also signed by other officers. Notwithstanding such deposits, the by-laws provided that he should remain personally liable for the safe-keeping and forthcoming of the funds when required, and that the approval by the directors of a depository, and a bond given by it, should not relieve him from such liability on his own bond. A by-law provided that bonds of depositories should be made payable "to the head banker and to the Modern Woodmen of America, or either of them," and that they should be executed in duplicate, one to be held by the head banker, and one by the board of directors. Such a bond, given by an approved depository, referred to such by-law, and ran to plaintiff by name as head banker, and to the society "jointly and severally," and was conditioned in a penal sum to be paid to plaintiff "as head banker of said Modern Woodmen of America, and to the said Modern Woodmen of America, or either him or it." *Held* that, construing the language of such bond in view of relations between the society and plaintiff, and the latter's continued responsibility for the funds, it was clearly intended, not only as security for the society, but also as personal security for plaintiff—no reference being made therein to his successor in office; that on the death of the principal, and the refusal of his representatives to transfer the funds on deposit on his demand, plaintiff could maintain an action thereon, against the sureties, in his own name, even though his term of office had expired before the action was commenced.

—*Bort v. E. H. McCutchen & Co.*, 157 Fed. 182.....84 C. C. A. 630

DEPOSITIONS.

See "Witnesses."

DEPOSITS.

In bank, see "Banks and Banking," § 1.

DISCHARGE.

From employment, see "Master and Servant," § 1.

From indebtedness, see "Release."

DISCRETION OF COURT.

Consolidation of action, see "Actions," § 1.

Review in civil actions, see "Appeal and Error," § 7.

Review of discretionary rulings, see "Criminal Law," § 13.

DISCRIMINATION.

By carrier, see "Carriers," § 1.

DISMISSAL AND NONSUIT.

Dismissal on hearing of bankruptcy proceedings, see "Bankruptcy," § 1.

DISORDERLY HOUSE.

Although Alaska Pen. Code, § 128, expressly makes common fame competent evidence in support of an indictment for keeping a bawdyhouse for purposes of prostitution, such evidence alone is not sufficient proof to warrant a conviction, but there must be some evidence that the house was in fact kept and used for such purposes.

—Hall v. United States, 155 Fed. 52.....84 C. C. A. 215

DISTRIBUTION.

Of estate of bankrupt, see "Bankruptcy," § 4.

DIVERSE CITIZENSHIP.

Ground of jurisdiction of United States courts, see "Courts," § 2; "Removal of Causes," § 1.

DIVORCE.

§ 1. Jurisdiction, proceedings, and relief.

Carter's Alaska Code, pt. 4, § 504, which provides for appeals from the District Court for the district of Alaska to the Circuit Court of Appeals for the Ninth Circuit in civil causes where the amount involved or the value of the subject-matter exceeds \$500, does not authorize an appeal from a decree granting or denying a divorce or awarding the custody of their minor children to one or the other of the divorced parties.

—Leak v. Leak, 156 Fed. 473.....84 C. C. A. 283

A decree of the District Court of Alaska granting or denying a divorce or awarding the custody of minor children in a divorce suit is not appealable under Carter's Alaska Codes, pt. 4, § 504, which provides for appeals only in cases involving money or property.

—Leak v. Leak, 156 Fed. 474.....84 C. C. A. 284

§ 2. Alimony, allowances, and disposition of property.

Under Carter's Alaska Codes, pt. 4, § 471, which authorizes the court in a divorce suit in its discretion to provide by order that the husband pay such an amount of money as may be necessary to enable the wife to prosecute or defend the suit, and also for the care and custody and maintenance of the minor children of the marriage during the pendency of the action, the court may properly order the husband to deposit a sufficient amount to pay the costs and expense of an appeal by the wife, and may also allow to the wife the cost of medical attendance necessarily incurred pending the suit for a minor child in her custody, but it has no power to award her a sum to cover the cost of depositions previously taken by her; the allowance authorized by the statute being for future expenses only.

—Leak v. Leak, 156 Fed. 474.....84 C. C. A. 284

DOCUMENTS.

As evidence in criminal prosecutions, see "Criminal Law," § 8.

DOMICILE.

Residence as ground of jurisdiction, see "Courts," § 2.

DUPLICITY.

In indictment, see "Indictment and Information," § 1.

In pleading, see "Pleading," § 2.

DUTIES.

Customs duties, see "Customs Duties."

Excise duties, see "Internal Revenue."

EJECTMENT.

§ 1. **Pleading and evidence.**

It is permissible for a petition in ejectment to describe the land sought to be recovered as all of a certain tract, except portions thereof embraced in prior grants and patents from the state; but in such case, to support a judgment for the plaintiff, the parts excluded must be accurately described.

—Green v. Davis, 156 Fed. 352.....84 C. C. A. 248

EMINENT DOMAIN.

§ 1. **Remedies of owners of property.**

The owner of a lot abutting on a street, with title in fee extending to the center of the street, subject only to the easement for street purposes, under the law of Illinois may maintain a suit in equity to enjoin a corporation from appropriating and using the street for railroad purposes, and the question whether the corporation is one to which the state statute has delegated the power to make such appropriation by condemnation proceedings may be raised and determined in such suit.

—Greene v. Aurora Rys. Co., 137 Fed. 85.....84 C. C. A. 589

EMPLOYÉS.

See "Master and Servant."

ENTRY.

Of imported goods, see "Customs Duties," § 2.

ENTRY, WRIT OF.

See "Ejectment."

EQUITABLE ESTOPPEL.

See "Estoppel," § 1.

EQUITY.

Equitable estoppel, see "Estoppel," § 1.

Particular subjects of equitable jurisdiction and equitable remedies.

See "Cancellation of Instruments"; "Injunction"; "Quieting Title"; "Receivers"; "Trusts."

Enforcement of liabilities of stockholder of insolvent corporation, see "Corporations," § 2.

Relief against judgment, see "Judgment," § 2.

Restraining waste, see "Waste."

Suits for infringement of patents, see "Patents," § 5.

§ 1. Jurisdiction, principles, and maxims.

A bill in equity alleged that complainant owned certain stock and bonds of a railroad company; that defendant represented that he had contracted to sell a large amount of the stock and bonds of said company to another company and agreed to pay complainant the same prices he was to receive for his stock and bonds and for those of other holders which he might secure; that a written contract to that effect was entered into between them and carried out, but that such representations were false and fraudulent, in that defendant was to receive, and did receive, larger prices than those stated, the exact amount of which were unknown to complainant. *Held*, that such bill did not state a cause of action cognizable by a federal court of equity, complainant having on the facts alleged a complete and adequate remedy at law by an action to recover damages for the fraud, and the amount actually received by defendant being as readily ascertainable in such an action as in an equity suit.

—*Martin v. Wilson*, 155 Fed. 97.....84 C. C. A. 13

An action at law is not as practicable, efficient, or adequate a remedy as a suit in equity, where the controversy involves an account which consists of many items, and a federal court has jurisdiction of it in equity.

—*Butler Bros. Shoe Co. v. United States Rubber Co.*, 156 Fed. 1....
84 C. C. A. 167

There is no comprehensive discretion reposed in the chancellor by modern equity jurisprudence to make and unmake contracts of parties subject to such limitations only as meet the approval of his conscience, but courts of equity are now required as much as courts of law to enforce contracts free from fraud, and to refrain from making contracts for the parties on which their minds never met.

—*McElroy v. Masterson*, 156 Fed. 36.....84 C. C. A. 202

In the process of development, equity jurisprudence has assumed the qualities of a composite system of settled rules and principles by which the property rights of parties are measured and limited, and are rendered more certain and stable.

—*McElroy v. Masterson*, 156 Fed. 36.....84 C. C. A. 202

A lessee of mining claims under an executed lease for a term to commence on a future date, on and after such date, although never having been in possession, may maintain ejectment against another claiming title who wrongfully withholds such possession, and, his remedy at law to obtain possession by such an action being complete and adequate, a suit in equity for that purpose and to establish his title cannot be maintained, even though other relief of an equitable nature is also prayed for, such as an injunction to prevent waste, an accounting, and the cancellation of instruments alleged to constitute a cloud on his title, which relief, if necessary or proper, must be sought by an ancillary suit in aid of his action at law.

—*Johnston v. Corson Gold Min. Co.*, 157 Fed. 145....84 C. C. A. 593

1 2. Laches and stale demands.

A delay of more than 10 years in bringing suit, and beyond the time limited by statute for bringing an action at law, constitutes such laches, prima facie, as will bar relief in equity, unless the delay was excusable under the facts alleged.

—Citizens' Savings & Trust Co. v. Belleville & S. L. R. Co., 157 Fed. 73.....84 C. C. A. 577

Defendant railroad company issued stock to a county, receiving in payment bonds of the county which it sold but which were afterward adjudged void. The stock was also afterward canceled at suit of a stockholder. Subsequently complainant, which was a holder of certain of the bonds, brought suit against defendant, and obtained a decree adjudging that defendant held the stock issued on account of complainant's bonds in trust for its benefit, and it was then issued to complainant. Prior to such suit, and pending the suit for cancellation of the county's stock, defendant declared and paid a dividend on its other stock, but purposely omitted such stock upon which it denied any liability. In the suit of complainant to compel the issuance to it of stock, it made no claim for such dividend, but more than 10 years after the same had been declared made demand therefor and brought a second suit in equity for its recovery. *Held*, that prima facie such suit was barred by laches, and that the delay was not excused by general averments in the bill of want of knowledge of the dividend of due diligence and concealment by defendant, without the allegation of any facts to support such general averments.

—Citizens' Savings & Trust Co. v. Belleville & S. L. R. Co., 157 Fed. 73.....84 C. C. A. 577

Complainant had a judgment against T. in 1885 which he could not collect. In January, 1889, two tracts of land were conveyed to S., a sister of T., who in February, 1889, conveyed them to Thomson, who in November, 1895, conveyed them to Mrs. T. and Mrs. C., the wife and daughter of S., respectively. T. died on March 14, 1896, and the deeds were first recorded on March 16, 1896. Complainant brought suit to subject the property to the payment of the judgment more than five years after the deeds were recorded. The statutory limitation was three years after discovery of the fraud. The complainant first discovered in January, 1901, by inquiry among the friends and neighbors of T. that S. was his sister, and by search in the indices of the records, the conveyances in question, and no reason why an earlier discovery was not made, except the pendency of a suit to cancel the judgment, was shown. *Held*:

Complainant failed to establish any sound reason in equity why the doctrine of laches should not be applied in analogy to the statutory limitation, and he could not recover.

Ordinary diligence required him to examine the records in the name of T., at least once in three years, and if he had exercised the same diligence in 1896 or 1897 that he used in 1901, he would have discovered the fraud.

—Redd v. Brun, 157 Fed. 190.....84 C. C. A. 638

If by the exercise of ordinary diligence he could have discovered it in time to have brought his suit within the limit fixed by the statute, he was guilty of laches, and his suit cannot be maintained.

—Redd v. Brun, 157 Fed. 190.....84 C. C. A. 638

If he failed to discover the fraud within the statutory limit, he must plead and prove the time when he discovered it, the means by which he found it out, the impediments which prevented its earlier discovery, and the diligence he exercised.

—Redd v. Brun, 157 Fed. 190.....84 C. C. A. 638

If a complainant would maintain a suit instituted after the expiration of the statutory limit, he must plead and prove especial facts or circumstances which show that he was not guilty of laches which take his case

out of the ordinary rule and make it equitable to allow its maintenance after the statutory period has expired.

—Redd v. Brun, 157 Fed. 190.....84 C. C. A. 638

The federal courts, sitting in equity, are not bound by, but they apply the doctrine of laches in analogy to, the statute of limitations of actions at law, and, in the absence of extraordinary facts and circumstances, decline to sustain suits commenced after the statutory period.

—Redd v. Brun, 157 Fed. 190.....84 C. C. A. 638

§ 3. Pleading.

Filing a replication and taking the proofs waives no substantial insufficiency of the facts set forth in a plea or answer to constitute a defense.

—Butler Bros. Shoe Co. v. United States Rubber Co., 156 Fed. 1....
84 C. C. A. 167

A bill against a corporation, which asks for the cancellation of releases alleged to have been fraudulently obtained by defendant, and further asks that defendant be wound up on the ground of insolvency, and also on the ground that its business is illegal, states a case cognizable in equity, so that the bill cannot be dismissed on the ground that complainant has an adequate remedy at law, because, when a bill states one cause of action cognizable in equity, it is not subject to a motion to dismiss, even though it states other grounds of suit not so cognizable.

—Haight & Freese Co. v. Weiss, 156 Fed. 328.....84 C. C. A. 224

§ 4. Bill of review.

Fraud in obtaining a decree cannot be made the basis of a bill of review, but only of an original bill to impeach the decree for fraud; the radical difference between the two kinds of bills being that a bill of review is a continuation of the original litigation, whereas a bill to impeach a decree for fraud is new and independent litigation.

—Dowagiac Mfg. Co. v. McSherry Mfg. Co., 155 Fed. 524.....
84 C. C. A. 38

ERROR, WRIT OF.

See "Appeal and Error."

ESCROWS.

Three certificates of stock in a mining company, indorsed in blank and representing shares held by several co-owners, were deposited by them in a bank under an option contract of sale (fully set forth in the opinion), containing provisions for the delivery of the stock to the purchaser upon payment of the purchase price, and for the surrender of the stock to the depositors in the event of default in the payment of the purchase price. The purchaser made default, and one of the depositors then called upon the bank to make a distribution or division of the shares represented by the certificates among the depositors according to their respective interests, and to procure from the mining company and deliver to the demandant a separate certificate for his interest. The bank did not comply with the demand, and thereupon the demandant sued it for conversion. *Held*, upon full consideration of the terms of the contract and of the rules of interpretation before stated, that it did not impose upon the bank the duty of distributing or dividing the stock among the several co-owners, or of procuring for and delivering to each a separate certificate for the shares to which he might be entitled, as between himself and his co-owners, and that therefore the bank's failure to comply with the demand did not constitute a conversion of the demandant's interest in the stock.

—Christian v. First Nat. Bank of Deadwood, S. D., 155 Fed. 705....
84 C. C. A. 53

ESTABLISHMENT.

Of trusts, see "Trusts," § 2.

ESTATES.

Estates for years, see "Landlord and Tenant."

ESTOPPEL.

By judgment, see "Judgment," § 3.

To allege error on appeal or writ of error, see "Appeal and Error," § 5.

To deny validity of county bonds, see "Counties," § 2.

To rescind contract of sale, see "Sales," § 2.

§ 1. Equitable estoppel.

In a suit to foreclose a mortgage, given to complainant by his son, against a grantee of the property, it appeared that defendant and the mortgagor were partners in a manufacturing business, and owners as tenants in common of the real estate used in the business. They entered into a contract by which the mortgagor retired as an active partner, but remained for a term of five years as a silent partner, leaving the most of his capital in the business, and also making defendant a loan to be used in the business and accounted for subject to its risks. He also conveyed his interest in the real estate to defendant "as a basis of credit," but took a bond for its reconveyance at the end of the partnership term. About that time he and defendant became involved in litigation respecting the latter's accounting under the partnership agreement, which did not, however, involve or affect the real estate. Pending such litigation, and after he had become entitled to a reconveyance of the real estate but had not received it, he executed the mortgage in suit to complainant, covering his interest in such real estate, to secure a valid indebtedness, which mortgage was duly recorded. Subsequently a settlement of the litigation was effected between the parties by which defendant paid the mortgagor a sum of money in full of his interest in the business and the loan and received a quitclaim deed to the mortgagor's interest in the real estate. Nothing was said in regard to the mortgage, and defendant had no actual knowledge of it. Complainant, who resided in another state, hearing of the pending settlement, visited his son, and, on completion of the settlement, received part payment of the mortgage debt from the proceeds, a portion of which he gave to his son to be invested for the benefit of his family. It was in dispute whether he arrived before or after the completion of the settlement, but in any event he took no part therein. *Held*, that there was nothing in such facts or in complainant's conduct which created an equitable estoppel to prevent him from enforcing his mortgage against the property for the balance due him.

—Clark v. Lyster, 155 Fed. 513.....84 C. C. A. 27

EVIDENCE.

See "Witnesses."

As to particular facts or issues.

See "Damages," § 1.

In actions by or against particular classes of persons.

See "Attorney and Client," § 2; "Brokers," § 2; "Carriers," § 2.

In particular civil actions or proceedings.

See "Negligence," § 2.

For broker's commission, see "Brokers," § 2.

For death caused by operation of railroad, see "Railroads," § 3.

For infringement of patent, see "Patents," § 5.

For personal injuries, see "Master and Servant," § 5.

For services of attorney, see "Attorney and Client," § 2.

For unfair competition, see "Trade-Marks and Trade-Names," § 2.

On insurance policy, see "Insurance," § 3.

In criminal prosecutions.

See "Conspiracy," § 1; "Criminal Law," §§ 5-9; "Larceny," § 1; "Perjury," § 2.

For keeping disorderly house, see "Disorderly House."

Review and procedure thereon in appellate courts.

Harmless error in rulings on, see "Appeal and Error," § 9.

Presentation in lower court of grounds of review, see "Criminal Law," § 12.

Preservation in lower court of grounds of review, see "Appeal and Error," § 2.

Review of discretionary rulings on, see "Criminal Law," § 13.

Review of evidence in general, see "Appeal and Error," § 8.

§ 1. Burden of proof.

In an action by a corporation against its agent to charge him with a balance of money advanced to him to be used for plaintiff and not accounted for, where the receipt of the sums alleged to have been so advanced was put in issue by defendant, the burden of proving such advances rested upon the plaintiff, and was not sustained by the introduction in evidence of defendant's account as shown on plaintiff's books, where its secretary testified that many of the debit items in such account were entered by him on hearsay and without any knowledge on his part as to their correctness; nor was the defendant in such case called upon to introduce evidence to impeach the correctness of such entries.

—*Rosenthal v. Pine Hill Consol. Min. Co.*, 157 Fed. 83.....
84 C. C. A. 587

§ 2. Relevancy, materiality, and competency in general.

The petition in an action against the lessee of a theater for a personal injury alleged that among the appliances of the theater of which defendant had control was a fire extinguisher which was kept on the sill of an open window at the side of the stairway leading to the gallery of the theater; that it was unsecured, and was in a place where men and boys, in crowding down the stairway, as was usual at the close of a performance, were likely to knock it out of the window, as they in fact did, and that it fell and injured plaintiff, who was on the walk below. *Held*, that evidence was admissible to show that the descending crowd had several times previously dislodged the fire extinguisher from its place in the window, and that such fact was known to defendant, as material in determining whether or not the fire extinguisher was in an unsafe and dangerous place, and whether defendant was negligent in placing and permitting it to remain there on the occasion in issue.

—*Stair v. Kane*, 156 Fed. 100.....84 C. C. A. 126

§ 3. Admissions.

Where plaintiff sued defendant, a banker, for losses sustained through an agent, on the ground that defendant knowingly permitted the agent to deposit money advanced to him by plaintiff to his own credit in violation of his contract, an allegation in the answer that plaintiff had previously sued the agent for such losses and recovered judgment for a much smaller sum than that demanded from defendant was not an admission

by defendant of his liability for the amount of such judgment, to which he was not a party.

—Harris & Co. v. Chipman, [156](#) Fed. 929; Chipman v. Harris & Co., Id.....[84](#) C. C. A. [420](#)

§ 4. Parol or extrinsic evidence affecting writings.

Where the provisions of a written contract of sale are clear and intelligible, parol evidence of prior conversations between the parties is not admissible to prove an intention inconsistent with the writing.

—Noyes v. Marlott, [156](#) Fed. [753](#).....[84](#) C. C. A. [409](#)

Where the provisions of a written contract of sale are clear and unambiguous, they cannot be changed or affected in meaning by proof of a custom at variance therewith.

—Noyes v. Marlott, [156](#) Fed. [753](#).....[84](#) C. C. A. [409](#)

EXCEPTIONS, BILL OF.

Necessity for purpose of review, see "Appeal and Error," [§ 2](#).

EXCISE.

Duties, see "Internal Revenue."

EXECUTORS AND ADMINISTRATORS.

Testamentary trustees, see "Trusts."

EXEMPTIONS.

Of bankrupt, see "Bankruptcy," [§ 5](#).

FACTORS.

See "Brokers."

FALSE PRETENSES.

Jurisdiction of United States court in Alaska, see "Criminal Law," [§ 1](#).

To constitute the crime of obtaining money under false pretenses, the alleged false representation must be of some past or existing fact, and an information charging that a defendant obtained money from persons named as rental for a building, by means of false representations that the municipal authorities would permit gambling games to be played therein during a race meeting to be held in the future, is insufficient to charge an offense.

—Biddle v. United States, [156](#) Fed. [759](#).....[84](#) C. C. A. [415](#)

FALSE SWEARING.

See "Perjury."

FEDERAL COURTS.

See "Courts," [§ 2](#).

[84](#) C.C.A.—46

FEDERAL QUESTIONS.

Ground for jurisdiction, see "Courts," § 2.

FEES.

In bankruptcy, see "Bankruptcy," § 8.

Of attorney, see "Attorney and Client," § 2.

FELLOW SERVANTS.

See "Master and Servant," § 2.

FILING.

Of protest by Importers, see "Customs Duties," § 2.

FINDINGS.

Review on appeal or writ of error, see "Appeal and Error," § 8.

FOLLOWING TRUST PROPERTY.

See "Trusts," § 2.

FOREIGN CORPORATIONS.

See "Corporations," § 3.

FORMER ADJUDICATION.

See "Judgment," § 3.

FORMER JEOPARDY.

Bar to prosecution, see "Criminal Law," § 3.

FORMS OF ACTION.

See "Ejectment."

FRANCHISES.

Power of municipal corporation to grant, see "Municipal Corporations," § 1.

FRAUD.

See "False Pretenses."

As ground for relief against judgment, see "Judgment," § 2.

Effect on limitation, see "Limitation of Actions," § 1.

In adjustment of general average, see "Shipping," § 2.

In release, see "Release," § 1.

§ 1. Deception constituting fraud, and liability therefor.

Where no other means were employed to induce a plaintiff to accept a proposition for a sale of bonds than the language contained in a writing, plaintiff cannot be heard to say that, because of his or her inaptness in comprehending on examination the ordinary import and common acceptance of the terms employed, they must be made to mean more or other than what they express.

—Kimber v. Young, 157 Fed. 199.....84 C. C. A. 647

Allegations in the complaint in an action for fraud and deceit that plaintiff was induced to buy certain bonds of a corporation by false representations are not supported by a letter, written by defendant to plaintiff, in which he gave her the numbers of the bonds to be sold, stated that the bond issue was arranged so that one-tenth would fall due each year and the maturity of each bond was stated on its face, that the bonds offered came in before those owned by defendant and his associates, and that, "indeed, you may be said to hold the preferred place on the list"; the only representation made which could in any event be actionable being that as to the preferential character of the bonds offered, which, construed in the light of the other statements, clearly meant no more than that they matured before those bearing higher numbers in the series, and which was not shown to be untrue, there being no allegation in respect to any bonds owned by defendant and his associates.

—Kimber v. Young, 157 Fed. 199.....84 C. C. A. 647

§ 2. Actions.

An action for fraud and deceit must be predicated on existing facts and not of matters possible to arise, and the plaintiff's pleading must allege that the representations were false and that plaintiff was misled thereby to his injury.

—Kimber v. Young, 157 Fed. 199.....84 C. C. A. 647

Where the complaint in an action for fraud and deceit alleged that the representations made were in writing and made to plaintiff, oral statements made by defendant to a third person are not admissible in support of such complaint.

—Kimber v. Young, 157 Fed. 199.....84 C. C. A. 647

FRAUDS, STATUTE OF.

§ 1. Real property and estates and interests therein.

A parol agreement by which one party agreed to locate and mark mining claims and prepare the notices of location which were to be recorded by and at the expense of the other parties, the first party to have a half interest in the claims, and the second parties the other half interest, was one for a joint venture, to which both parties were to contribute personal services and money for their joint and equal benefit, and is not within the statute of frauds.

—Cascaden v. Dunbar, 157 Fed. 62; Dunbar v. Cascaden, Id.....
84 C. C. A. 566

§ 2. Requisites and sufficiency of writing.

A promissory note by which the makers promised to pay a stated sum to the payee on a future date on surrender of certain shares of stock of a corporation, accepted by the payee, is a written contract to take and pay for such shares, and is not within the statute of frauds.

—In re Neff, 157 Fed. 57.....84 C. C. A. 561

FRAUDULENT CONVEYANCES.

By bankrupt, see "Bankruptcy," § 2.

GENERAL APPRAISERS.

Board of, see "Customs Duties," § 2.

GENERAL AVERAGE.

See "Shipping," § 2.

GRAND JURY.

See "Indictment and Information."

GRANTS.

Of public lands, see "Public Lands."

HARMLESS ERROR.

In civil actions, see "Appeal and Error," § 9.

HIGHWAYS.

See "Municipal Corporations," § 1.

Accidents at railroad crossings, see "Railroads," § 2.

HOMESTEAD.

Exemptions of bankrupt, see "Bankruptcy," §§ 5, 7.

Judicial notice in criminal prosecution of regulations as to homestead entries of public land, see "Criminal Law," § 5.

Legality of contract to enter land under homestead law, see "Contracts," § 1.

Regulations of land office respecting homestead entries as documentary evidence, see "Criminal Law," § 8.

HUSBAND AND WIFE.

See "Divorce."

§ 1. Community property.

Defendant entered into a contract with one having a preferential right to purchase tide lots from the state of Washington, and who had applied for such purchase, by which the right to purchase a portion of the lots was assigned to him, and he made a payment therefor. Subsequently, the state commissioners granted the application to purchase as to certain of the lots, but denied it as to others, and in consequence the contract was abandoned. Defendant married, and shortly afterward, the amount he had paid on the contract not having been returned, a new agreement was made, by which he was given a quitclaim deed to certain of the lots in consideration of such payment, and acquired title thereto from the state; the payments being made in part with money of his wife and in part with community funds. *Held*, that under the law of the state that land acquired after marriage by a deed expressing a money consideration is presumptively community property, and that it requires clear and convincing proof to overcome the presumption, such facts were not sufficient to establish the individual ownership of defendant, nor to support

a decree for the specific performance by him of a contract for the sale of one of the lots in which his wife did not join, as required by the law of the state, to make a valid contract for a sale of community property.

—Davidson v. Woodward, [156](#) Fed. 915.....[84](#) C. C. A. [493](#)

IMPEACHMENT.

Of witness, see "Witnesses," § [3](#).

IMPORTS.

Duties, see "Customs Duties."

INDEBITATUS ASSUMPSIT.

For collection of taxes, see "Taxation," § [1](#).

INDEPENDENT CONTRACTORS.

See "Master and Servant," § [6](#).

INDICTMENT AND INFORMATION.

For particular offenses.

See "Conspiracy," § [1](#); "Contempt," § [1](#); "Perjury," § [2](#).

§ [1](#). Joinder of parties, offenses, and counts, duplicity, and election.

An indictment under Rev. St. § 3893, as amended by Act Sept. [26](#), 1888, c. 1039, § [2](#), [25](#) Stat. [496](#) [U. S. Comp. St. 1901, p. 2658], charging the defendant with having mailed a letter giving information where and how, and of whom and by what means, articles and things designed and intended "for the prevention of conception and for the procuring of abortion" might be obtained, does not charge two offenses.

—Lee v. United States, [156](#) Fed. 948.....[84](#) C. C. A. [448](#)

§ [2](#). Motion to quash or dismiss, and demurrer.

Objections to the sufficiency of an indictment cannot be raised by objecting to the introduction of any evidence thereunder.

—Nurnberger v. United States, [156](#) Fed. [721](#).....[84](#) C. C. A. [377](#)

INFORMATION.

Criminal accusation, see "Indictment and Information."

INFRINGEMENT.

Of copyright, see "Copyrights," § [2](#).

Of patent, see "Patents," §§ [5](#), [6](#).

INJUNCTION.

Jurisdiction of United States court to enjoin enforcement of municipal ordinance, see "Courts," § [2](#).

Restraining use of property for railroad purposes, see "Eminent Domain," § [1](#).

Restraining waste, see "Waste."

§ 1. Preliminary and interlocutory injunctions.

A preliminary injunction, restraining the enforcement of a state grain inspection law in respect to interstate shipments pending a final hearing as to its constitutionality, *held* not improvidently granted upon the facts shown, and sustained, without consideration of the case on its merits.

—Andrew v. Globe Elevator Co., 156 Fed. 664.....84 C. C. A. 376

§ 2. Violation and punishment.

The fact that a defendant's first name was stated incorrectly in the pleadings, decree, and an injunction order does not relieve him from liability for contempt for violation of such order, where he was in fact served with process or appeared, and the circumstances were such that he could not have been misled as to the person intended.

—Aaron v. United States, 155 Fed. 833.....84 C. C. A. 67

A petition or motion for the attachment of a defendant for contempt in violating an injunction, which is entitled as in the original suit, and refers to the order of injunction granted therein by its date, and sets out in detail the alleged acts of violation, is sufficient, and need not set out the order in terms.

—Aaron v. United States, 155 Fed. 833.....84 C. C. A. 67

IN PAIS.

Estoppel, see "Estoppel," § 1.

INSOLVENCY.

See "Bankruptcy."

Of corporation, see "Corporations," § 2.

INSTRUCTIONS.

In civil actions, see "Trial," §§ 1, 2.

In criminal prosecutions, see "Criminal Law," § 11.

INSURANCE.

Computation of limitations in action by insurance company to recover amount paid on policy, see "Limitation of Actions," § 1.

Judicial notice in criminal prosecution of regulations of general land office, see "Criminal Law," § 5.

Pleading release in action on policy, see "Release," § 2.

§ 1. Control and regulation in general.

Where a life insurance company incorporated under the laws of one state has subjected itself to suit in another state in which it does business, has agreed in accordance with its laws that service of process may be made upon the insurance commissioner of such state, and has issued policies to its citizens, such a policy holder has the right to maintain a suit against it in his own state in either the state or federal courts for a construction of his policy and a determination of his rights thereunder and the legality of acts of the company as bearing thereon, and such right may not be denied on the ground that such a suit is an interference with the internal management of a foreign corporation.

—Castagnino v. Mutual Reserve Fund Life Ass'n, 157 Fed. 20.....
84 C. C. A. 533

§ 2. Extent of loss and liability of insurer.

In a marine policy insuring a tug against legal liability for loss or damage caused to its tows or other vessels through collision or stranding, the usual "sue and labor" clause has reference only to the subject-matter of the insurance, and has no application to expenses incurred in defending the tug itself against an unsuccessful suit to establish its liability.

—*Munson v. Standard Marine Ins. Co.*, 156 Fed. 44, 84 C. C. A. 210

A marine policy insuring a tug merely against legal liability for loss or damage caused to its tows by collision or stranding creates no liability on the part of the insurer for the expense of successfully defending the tug against a suit to recover for the stranding of tows.

—*Munson v. Standard Marine Ins. Co.*, 156 Fed. 44, 84 C. C. A. 210

§ 3. Actions on policies.

Evidence considered in a suit of interpleader between the widow and a former partner of a decedent to determine the right to the proceeds of a policy of insurance on his life, which was by its terms payable to his estate, but by an agreement between the partners was to be held for the benefit of the partnership, and held to sustain the claim of the widow that the partnership had been dissolved some months prior to her husband's death, and all matters between the partners settled.

—*Osius v. Davis*, 156 Fed. 569.....84 C. C. A. 335

INTERLOCUTORY INJUNCTION.

See "Injunction," § 1.

INTERLOCUTORY JUDGMENT.

Appealability, see "Appeal and Error," § 1.

INTERNAL REVENUE.

The United States cannot maintain an action of debt for the recovery of stamp taxes owing on a deed of conveyance under War Revenue Act June 13, 1898, c. 448, § 25, Schedule A, 30 Stat. 457 [U. S. Comp. St. 1901, p. 2200], by reason of the failure to affix the required stamps thereto. There being no express authority in the statute for such a proceeding, the means of enforcing payment of the tax are limited to the penal provisions contained therein.

—*United States v. Chamberlin*, 156 Fed. 881.....84 C. C. A. 461

Where the government made an assessment against a distiller of the tax on spirits made from material used and not reported, and a portion of such spirits were found seized and sold, and the tax on such part paid from the proceeds, the surety on the distiller's bond, when charged with liability for the assessment, is entitled to credit for the part of the tax so paid, but not for the remainder of the proceeds of the sale.

—*United States v. National Surety Co.*, 157 Fed. 174, 84 C. C. A. 622

Rev. St. § 3221, as amended by Act March 1, 1879, c. 125, § 6, 20 Stat. 341 [U. S. Comp. St. 1901, p. 2087], which provides that when any distilled spirits deposited in warehouse are destroyed by accidental fire or other casualty without fraud, collusion, or negligence of the owner thereof no taxes shall be collected on such spirits, confers on such owner a legal right which is enforceable in the courts, and is not dependent on the discretionary action of the Secretary of the Treasury, and such destruction of spirits in a warehouse by accidental fire may be set up as a defense to an action by the government on a distiller's bond to recover the taxes thereon.

—*Freeman v. United States*, 157 Fed. 195.....84 C. C. A. 643

INTERNATIONAL LAW.

See "Treaties."

INTERSTATE COMMERCE.

Regulation, see "Carriers," § 1; "Commerce."

INTOXICATING LIQUORS.

Distillers' bonds under revenue laws, see "Internal Revenue."

INVENTION.

See "Patents."

ISSUES.

Presented for review on appeal, see "Appeal and Error," § 2.

JEOPARDY.

Former jeopardy bar to prosecution, see "Criminal Law," § 3.

JOINDER.

Of causes of action, see "Action," § 1.

JOINT ADVENTURES.

Requirements of statute of frauds affecting agreement for joint venture, see "Frauds, Statute of," § 1.

JUDGES.

See "Courts."

Mandamus to judge, see "Mandamus," § 1.

JUDGMENT.

Decisions of courts in general, see "Courts," § 1.

On appeal or writ of error, see "Appeal and Error," § 10.

Review, see "Appeal and Error."

§ 1. Amendment, correction, and review in same court.

It is within the power of a court to amend its record of a judgment at a subsequent term to prevent injustice through a mistake or inadvertence of the judge or counsel or the clerk, as by correcting the wording of an order of dismissal which by mistake did not conform to the motion on which it was based.

—Bernard v. Abel, 156 Fed. 649; In re Bernard, Id.. 84 C. C. A. 361

It is not a fatal objection to a nunc pro tunc order correcting a judgment on the ground of mistake that the motion therefor was not served

as many days before the hearing as required by the rules of court in case of ordinary motions in suits.

—Bernard v. Abel, 156 Fed. 649; In re Bernard, Id. .84 C. C. A. 361

§ 2. Equitable relief.

A bill to impeach a decree for fraud, the relief sought being an injunction to restrain its enforcement, is not the same in purpose as an appeal, and the court which rendered the decree has jurisdiction to entertain such a bill, although an appeal from the decree is pending.

—Dowagiac Mfg. Co. v. McSherry Mfg. Co., 155 Fed. 524.....
84 C. C. A. 38

§ 3. Merger and bar of causes of action and defenses.

A final decree of a state court in a suit brought for the cancellation of a mortgage and foreclosure deed on condition of paying the mortgage debt with interest and costs, even though on demurrer, is a bar to a subsequent suit in a federal court for the same purpose against the same defendants or their privies; the grounds relied upon in the pleading being the same in both actions.

—Stewart v. Board of Trustees of Park College, 156 Fed. 773.....
84 C. C. A. 451

JUDICIAL NOTICE.

In criminal prosecutions, see "Criminal Law," § 5.

JURISDICTION.

Of actions for divorce, see "Divorce," § 1.

Of criminal prosecutions, see "Criminal Law," § 1.

Of particular courts, see "Bankruptcy," §§ 2, 3; "Courts."

JURY.

Custody and conduct, see "Trial," § 3.

Disqualification or misconduct ground for new trial, see "New Trial," § 1.

Instructions in civil actions, see "Trial," §§ 1, 2.

Instructions in criminal prosecutions, see "Criminal Law," § 11.

Questions for jury in criminal prosecutions, see "Criminal Law," § 10.

Right to trial by jury in bankruptcy proceedings, see "Bankruptcy," § 1.

KNOWLEDGE.

By servants of defects, see "Master and Servant," § 3.

Effect of ignorance of cause of action on limitation, see "Limitation of Actions," § 1.

LACHES.

Affecting right to an accounting as to profits in suit to restrain unfair competition, see "Trade-Marks and Trade-Names," § 2.

Effect in equity, see "Equity," § 2.

LANDLORD AND TENANT.

Mining leases, see "Mines and Minerals," § 2.

Possession of tenant for landlord, see "Adverse Possession," §§ 1, 2.

Relevancy of evidence in action against lessee of theater, see "Evidence," § 2.

§ 1. **Terms for years.**

A lease to commence in futuro is grantable, and the fact that a lease fixes a date in the future for the commencement of the term does not make it an executory, rather than an executed, contract.

—*Johnston v. Corson Gold Min. Co.*, 157 Fed. 145....84 C. C. A. 593

§ 2. **Premises, and enjoyment and use thereof.**

Defendants were the owners of a building consisting of several floors leased to tenants engaged in the manufacture of shoes. There were two stairways reaching to the several floors from different sides of the building, and on another side was a freight elevator, the entrance to which opened on the street. There was no stairway from said entrance, and there was a sign on the elevator shaft reading, "For freight only." Plaintiff was a shoe workman, and, seeing a sign on that side of the building that vampers were wanted, asked a teamster the way into the building, and the teamster, who was going up with some leather, took plaintiff with him in the freight elevator. Plaintiff was told to return the next day, which he did, going down and coming back with some one who was using the elevator. On the second day, not having been employed, when he wished to go down, there was no one at the elevator, but the door of the shaft was open, and he stepped in upon a trapdoor, which he supposed was the elevator. In a moment the elevator ascended, opening the trapdoor, and plaintiff was caught and injured. By the provisions of the leases, the operation of the elevator was left entirely to the tenants, who kept no one in charge, but each used it when occasion required. It was rarely used except by some one bringing up or taking down freight. *Held*, that plaintiff was not in the elevator by invitation of defendants or their tenants, either express or implied, and therefore defendants owed him no duty of care, and were not liable for his injury.

—*Missel v. Lennox*, 156 Fed. 347.....84 C. C. A. 243

LANDS.

See "Public Lands."

LARCENY.

See "False Pretenses."

Testimony of accomplices and codefendants, see "Criminal Law," § 9.

§ 1. **Prosecution and punishment.**

A verdict of conviction in a prosecution for larceny *held* not supported by any legal evidence.

—*Mickle v. United States*, 157 Fed. 220.....84 C. C. A. 672

LEASES.

See "Landlord and Tenant."

LETTERS PATENT.

For inventions, see "Patents."

LICENSES.

For mining, see "Mines and Minerals," § 2.

LIENS.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 2.

LIFE INSURANCE.

See "Insurance," § 1.

LIGHTS.

Of vessels, see "Collision," § 2.

LIMITATION.

Of claim of patent, see "Patents," § 4.

LIMITATION OF ACTIONS.

See "Adverse Possession."

Laches, see "Equity," § 2.

Limitation of criminal prosecutions, see "Criminal Law," § 2.

§ 1. Computation of period of limitation.

The statute of limitations begins to run from the time a right of action accrues for a breach of duty or contract or for a wrong, without regard to the time when actual damage results.

—Aachen & Munich Fire Ins. Co. v. Morton, 156 Fed. 654.....
84 C. C. A. 366

An insurance company undertook to cancel a policy in accordance with its terms by giving notice and returning the unearned premium. The policy having been lost, a lost policy receipt was given, signed by the owner of the property and mortgagees, to whom the policy was made payable, by which they agreed that, if the policy was found, it would be surrendered. The property was burned, and the policy, having been found, was assigned by the mortgagees to a third person, who recovered thereon against the company. *Held*, in an action by the company to recover the amount so paid out by it from one of the mortgagees, based on an alleged breach of the cancellation agreement, that such breach occurred and plaintiff's cause of action accrued at the time the policy was assigned by defendant in violation of his agreement to surrender it, and that the statute of limitations commenced to run at that time.

—Aachen & Munich Fire Ins. Co. v. Morton, 156 Fed. 654.....
84 C. C. A. 366

The statute of Colorado (section 2911, Mills' Ann. St.), which requires bills for relief on the ground of fraud to be filed within three years after discovery of the facts constituting the fraud, bars such suits three years after the discovery of facts which would awaken a person of ordinary prudence to an inquiry, which, if pursued with reasonable diligence, would lead to a discovery of the fraud.

—Redd v. Brun, 157 Fed. 190.....84 C. C. A. 638

§ 2. Pleading, evidence, trial, and review.

Under the common-law practice in force in Illinois, the question of limitation cannot be raised on demurrer to a declaration.

—Gray v. Grand Trunk Western Ry. Co., 156 Fed. 736..84 C. C. A. 392

LITERARY PROPERTY.

See "Copyrights."

The common law gives the author of a painting the exclusive right to reproduce the same so long as he does not make publication, but on pub-

lication such right is lost, and he can only acquire the right to further protection by a statutory copyright.

—*Callga v. Inter Ocean Newspaper Co.*, 157 Fed. 186. .84 C. C. A. 634

LOCATION.

Of mining claim, see "Mines and Minerals," § 1.

LOGS AND LOGGING.

Waste in removal of timber, see "Waste."

A provision, in a contract for the sale and delivery of logs to be scaled after delivery, that they shall be of merchantable timber, is not a warranty that all logs delivered thereunder are merchantable, but merely furnishes a description for the identification of such logs as fall within the contract.

—*Noyes v. Marlott*, 156 Fed. 753.....84 C. C. A. 409

Plaintiffs entered into a contract with defendant to fell, cut, raft, drive, and deliver a certain number of feet of logs of specified dimensions and quality in a slough extending from a river, where defendant agreed to construct a boom for their detention, to remove them to the banks of the river or to the mill, and at the time of such removal to scale the same and pay for each thousand feet so delivered and removed to the banks of the slough or the mill, "and not otherwise." A portion of the logs were so delivered, removed, and paid for; but the remainder, after being delivered into the boom, were carried away by a freshet and lost. *Held* that, plaintiffs having done all that they were to do, complete possession and title to the logs thereupon passed to defendant, and he became liable for the purchase price on proof of the quantity delivered, and that they conformed to the requirements of the contract as to dimensions and quality.

—*Noyes v. Marlott*, 156 Fed. 753.....84 C. C. A. 409

LOOKOUT.

On vessels, see "Collision," § 2.

LOTTERIES.

Use of mails in conducting lottery schemes, see "Post Office," § 1.

LUMBER.

See "Logs and Logging."

MACHINERY.

Liability of employer for defects, see "Master and Servant," § 3.

MANDAMUS.

Power of circuit court of appeals to interfere by mandamus to circuit court, see "Courts," § 2.

§ 1. Subjects and purposes of relief.

Mandamus will lie to control the action of an inferior court when it assumes to act beyond its jurisdiction, or where it refuses to take juris-

diction of a case and proceed to judgment therein when it is its duty to do so, and there is no other adequate remedy, but not to control its action in a matter which is within its jurisdiction to hear and determine.

—Dowagiac Mfg. Co. v. McSherry Mfg. Co., 155 Fed. 524.....
84 C. C. A. 38

MANDATE.

See "Mandamus."

MARINE INSURANCE.

See "Insurance," § 2.

MARRIAGE.

See "Divorce"; "Husband and Wife."

MARRIED WOMEN.

See "Husband and Wife."

MASTER AND SERVANT.

Construction of instructions in action for injuries to servant, see "Trial," § 2.
Evidence of damages in action for injuries to servant, see "Damages," § 1.

§ 1. The relation.

A verbal contract between the owner of a vessel and a marine engineer for the services of the latter, in which his wages were fixed at a stated sum per month, but without any specified term of employment, constituted a hiring at will, and not by the month, and in the absence of any established usage to the contrary, either party had the right to terminate the employment at any time without notice, and upon the employé's discharge, he was entitled to wages only to the time of such discharge.

—The Pokanoket, 156 Fed. 241.....84 C. C. A. 40

§ 2. Master's liability for injuries to servant—Fellow servants.

The fact that a foreman having charge of a gang of men works with his hands, the same as the rest of the men, for the greater part of the time, or even all of the time, does not necessarily exclude him from being one "whose * * * principal duty is that of superintendence," within the meaning of the Massachusetts employers' liability act (Rev. Laws, c. 106, §§ 71-79), for whose negligence, causing an injury to another employé, the master is liable.

—New England Telephone & Telegraph Co. v. Butler, 156 Fed. 321...
84 C. C. A. 217

A ground foreman in mining operations conducted under a general superintendent or manager is a fellow servant with the gang of miners whose work he directs.

—United Zinc Companies v. Wright, 156 Fed. 571.....84 C. C. A. 337

The fact that a foreman in charge of a single job of work being done by defendant corporation, who worked with the men under him, had the power to hire and discharge them and to direct their movements in that particular work, did not erect that single job into a department of defendant's business so as to make the foreman a vice principal, but he remained a fellow servant with the men under him, and for his negligence resulting in an injury to one of such men defendant cannot be held liable.

—Vilter Mfg. Co. v. Otte, 157 Fed. 230.....84 C. C. A. 673

§ 3. — Risks assumed by servant.

Plaintiff was employed on the third floor of defendant's packing house, which was reached by an outside stairway running up from a platform, 10 to 14 feet wide, extending along the side of the building. This platform was used by other employes in conveying meat on trucks from one part of the building to another, and there were more or less drippings from the trucks which in cold weather froze upon the platform. After plaintiff had been so employed for three years, in walking along the platform from the stairway in going from work one night in the winter, he slipped on the platform, and was injured. *Held* that, assuming that the fall was caused by ice resulting from such drippings, it was not due to any neglect or breach of duty on the part of defendant, but to a cause the risk from which was known to and assumed by plaintiff.

—*Omaha Packing Co. v. Sanduski*, 155 Fed. 897.....84 C. C. A. 89

The rule which makes it the positive duty of a master to exercise reasonable care to provide a servant with a reasonably safe place in which to work, even if it extends to providing a reasonably safe mode of entrance to and exit from the place where the workmen are employed, is not applicable to a case where the place becomes dangerous in the progress of the work either necessarily or from the manner in which the work is done.

—*Omaha Packing Co. v. Sanduski*, 155 Fed. 897.....84 C. C. A. 89

A servant engaged in operating a machine by standing at its side, instead of behind it, where its construction contemplated that the operator should stand, did not thereby assume the risk of injury from the breaking of a belt which was greater there than at the rear of the machine, where there was no obvious danger in the position taken, and in fact no danger at all if the appliances were sound, while the position behind the machine was obviously dangerous from other causes, and it was customary for all operators to stand at the side.

—*Northern Pac. Ry. Co. v. Wendel*, 156 Fed. 336.....84 C. C. A. 232

A workman, who was injured by the breaking of a belt used to run a machine, due to its weakness from age and from a recent splicing, although he had operated the machine for some years, cannot be held to have assumed the risk from such danger, where it is not shown that he knew the age of the belt, or what the life of such a belt was, or that the splicing would increase its tendency to break.

—*Northern Pac. Ry. Co. v. Wendel*, 156 Fed. 336.....84 C. C. A. 232

A lineman, engaged with others in removing wires from poles, who was injured by the falling of a pole on which he was at work, caused by its being rotten beneath the sidewalk in which it was planted, cannot be held to have assumed the risk from such danger under the circumstances explained.

—*Munroe v. Fred T. Ley & Co.*, 156 Fed. 468; *Same v. Edison Electric Illuminating Co. of Boston, Id.*.....84 C. C. A. 278

A drillman in a mine where it was the usual known custom to move the drills by hand up stopes having a practicable grade assumed the risk of injury from such manner of doing the work, and cannot recover from the owner for an injury so received, and he was not relieved from such assumption by a complaint made to the ground foreman of such method and a promise on his part to secure appliances, where he had no authority to do so, either actual or apparent, and whose only duty was to report the complaint to the superintendent, under whose direction all the work was conducted, which he failed to do.

—*United Zinc Companies v. Wright*, 156 Fed. 571...84 C. C. A. 337

The plaintiff, an experienced bollermaker's helper, was sent to punch some holes in a piece of galvanized iron with a power punch. The die, a piece of tempered steel 2½ inches in diameter with a suitable hole in it, lay in a depression in the block so that the punch struck the hole in it true when he went to do his work. This die had been fastened in its place by a set screw which extended through the side of the block and into the die, but this screw had been broken for more than a month, so

that the die was loose and there was danger that the punch would raise it from its position and displace it so that the punch would strike the solid steel of the die and injure the operator. The break in the screw and the looseness of the die were not readily observable, and the plaintiff was not aware of them. After he had punched several holes in the iron, and as he was making another, something struck his eye and put it out. After the accident there was a piece broken off of the point of the punch, and a piece broken off of the side of the hole in the die. Small particles sometimes fly off from galvanized iron when holes are punched in it, but there was no evidence that any serious injury had been known to result from them. *Held*: There was substantial evidence of causal negligence of the master. The evidence that the servant assumed the risk was not conclusive, and these questions were for the jury.

—American Smelting & Refining Co. v. McGee, 157 Fed. 69.....
84 C. C. A. 573

The request to charge that if the employé knew or had an opportunity to know of the defect and appreciate its risk he assumed it, or was guilty of contributory negligence, was properly refused because the defect was not readily observable. The true rule is that if the servant knew of the defect, or if it was so plainly observable that he could have seen it by the exercise of ordinary prudence, and if he appreciated that it was dangerous, he assumed the risk of it.

—American Smelting & Refining Co. v. McGee, 157 Fed. 69.....
84 C. C. A. 573

An employé who was at work in a tunnel from 5½ to 7 feet in height, repairing the track of a railroad operated by electricity by means of a trolley which ran on a wire suspended 5 or 6 inches beneath the right side of the roof of the tunnel, who had been warned to look out for the wire, that contact with it might kill him, and who had been once knocked down by electricity from it, stopped from his work of driving a wedge under a rail beneath the wire, arose from his stooping position until his neck struck it and was killed by the electricity therefrom. *Held*:

The employé assumed the risk of injury from the wire by entering and continuing in the employment.

—Burke v. Union Coal & Coke Co., 157 Fed. 178.....84 C. C. A. 626

A servant, by entering or continuing in the employment of a master, assumes the risks and dangers of the employment which he knows and appreciates, and those which an ordinarily prudent and careful person of his capacity and intelligence would have known and appreciated in his situation.

—Burke v. Union Coal & Coke Co., 157 Fed. 178.....84 C. C. A. 626

An employé cannot be heard to say that he did not appreciate or realize the risk or danger where the defects were obvious, and the dangers would have been apparent to an ordinarily prudent person of his intelligence and experience in his situation.

—Burke v. Union Coal & Coke Co., 157 Fed. 178.....84 C. C. A. 626

Among the risks and dangers which the servant assumes by entering or continuing in the employment without complaining of them are those which arise from defects that are obvious or readily observable through the failure of the master to completely discharge his duty to exercise ordinary care to furnish the servant with a reasonably safe place to work and with reasonably safe appliances to use.

—Burke v. Union Coal & Coke Co., 157 Fed. 178.....84 C. C. A. 626

§ 4. — Contributory negligence of servant.

In an action by a servant against the master to recover damages for a personal injury, an instruction that plaintiff's contributory negligence would not preclude his recovery, unless without it the defendant's negligence could not have caused the injury, was not erroneous.

—Northern Pac. Ry. Co. v. Wendel, 156 Fed. 336.....84 C. C. A. 232

The court rightly charged that it was the servant's duty to use that kind of care for his own safety that an ordinarily prudent man, under similar circumstances with the plaintiff's experience, would use, and that if he failed to exercise this care and that failure directly contributed to his injury, he could not recover.

—American Smelting & Refining Co. v. McGee, 157 Fed. 69.....
84 C. C. A. 573

The servant's opportunity to know of the defect, which was not obvious or readily observable, was not conclusive evidence of his negligence.

—American Smelting & Refining Co. v. McGee, 157 Fed. 69.....
84 C. C. A. 573

§ 5. — Actions.

The mere fact that an accident happened by which a servant was injured does not itself create a presumption of negligence on the part of the master, and, where negligence is charged as a ground for recovery by the servant against the master, the burden is upon the plaintiff to show that by some act or omission the defendant violated some duty he owed to the plaintiff which caused the injury.

—Omaha Packing Co. v. Sanduski, 155 Fed. 897.....84 C. C. A. 89

Plaintiff was a telephone lineman engaged, with others, under a subforeman, in stringing new wires. He was upon the cross-arm of one pole holding back two wires, while they were being run over the cross-arm of the next pole. To the end of the wires was tied a rope, and beyond that a piece of insulated wire. The foreman and others were beyond the next pole pulling the wires over the cross-arm, when he called to plaintiff to "let them come." Plaintiff did so, and the wires sagged and came in contact with highly charged electric light wires, which ran transversely across the line at a lower level, and he received a shock which caused his injury. There was evidence that the method pursued was not usual nor proper under the circumstances, the plaintiff did not know the position of the light wires, and, because of intervening trees, could not see it distinctly, nor tell whether the insulated wire, the rope, or the bare wires were over the light wires when he was ordered to slack. *Held*, that whether he had such knowledge of the situation that he assumed the risk, or was justified in relying on the care of the foreman and obeying the order, was a question for the jury.

—New England Telephone & Telegraph Co. v. Butler, 156 Fed. 321...
84 C. C. A. 217

Whether he was guilty of contributory negligence was a question for the jury.

—New England Telephone & Telegraph Co. v. Butler, 156 Fed. 321...
84 C. C. A. 217

In an action by an employé to recover for an injury resulting from the breaking of a belt used to run a planing machine, the alleged negligence of defendant being the use of a belt which was decayed and defective by reason of its age, it was not error to admit evidence offered by plaintiff to show that the knives of the machine were dull at the time, and the gauge inaccurate, not to establish an independent and different act of negligence, but as showing conditions likely to be met with and affecting the strain on the belt.

—Northern Pac. Ry. Co. v. Wendel, 156 Fed. 336.....84 C. C. A. 232

In an action by an employé to recover for an injury resulting from the breaking of a belt alleged to have been due to its age and defective condition, evidence that the breaking might have been due to other causes *held* insufficient to entitle defendant to the direction of a verdict.

—Northern Pac. Ry. Co. v. Wendel, 156 Fed. 336.....84 C. C. A. 232

Where the evidence on an issue of contributory negligence, in an action by an employé to recover for an injury, is conflicting, the question is one for the jury.

—Northern Pac. Ry. Co. v. Wendel, 156 Fed. 336.....84 C. C. A. 232

In an action by a lineman employed with others in removing electric light wires from the poles on which they were strung to recover for an injury caused by the falling of a pole on which he was at work, it was shown that the cause of the injury was the negligent method of doing the work; that the act of negligence which was the immediate cause of the falling of the pole was done by a workman by direction of one of two men who were standing on the ground, and not working with their hands, but giving directions to the workmen. *Held*, that such evidence was sufficient to entitle plaintiff to go to the jury on the question whether or not such men were, or either of them was, "entrusted with and exercising superintendence and whose sole or principal duty was that of superintendence," so as to render the defendant, as employer, liable for his negligence under the Massachusetts employer's liability act (Rev. Laws Mass. c. 106, § 71).

—Munroe v. Fred T. Ley & Co., 156 Fed. 468; Same v. Edison Electric Illuminating Co., of Boston, Id. 84 C. C. A. 278

Plaintiff, a boy 16 years old, was employed by defendant at its smelter, and was set to work at night to assist a man in the clean-up yard. This yard was paved with brick, and upon this floor was deposited cones of slag and other refuse which it was the duty of plaintiff and his fellow workman to load on cars and remove, it being necessary to break up the cones for that purpose. On the second night of such work plaintiff was breaking a cone with a sledge, when an explosion occurred by which he was seriously injured. It was shown that when cones contained molten metal, and there was any water or moisture in their vicinity, it was highly dangerous to break them while hot, as if the metal came in contact with water it would cause an explosion; also, that the floor of the yard had depressions where water might stand and that employes, with defendant's knowledge, sometimes emptied water in the yard. Plaintiff was given no instructions nor warning of danger, and, while he knew the effect if the hot metal came in contact with water, he did not know that there was any water in the yard, and could not see by reason of the darkness, nor did he know that the cone which he was breaking was hot. *Held*, that the question of defendant's negligence was properly submitted to the jury and that a verdict for plaintiff would not be disturbed.

—Northport Smelting & Refining Co. v. Twitchell, 156 Fed. 643. 84 C. C. A. 355

The question of contributory negligence was properly submitted to the jury, and a verdict for plaintiff would not be disturbed.

—Northport Smelting & Refining Co. v. Twitchell, 156 Fed. 643. 84 C. C. A. 355

Where the evidence that a servant was guilty of contributory negligence was not conclusive, the question is for the jury.

—American Smelting & Refining Co. v. McGee, 157 Fed. 69. 84 C. C. A. 573

Where the uncontradicted evidence discloses the fact that the defects in the place or machinery or method of operation were obvious, and the danger from them apparent to an ordinarily prudent person of the intelligence and capacity of the servant, and that the servant entered upon or continued in the service without complaint of them, the defense of assumption of risk is conclusively established, there is no question for the jury, and the court should instruct them to return a verdict for the master.

—Burke v. Union Coal & Coke Co., 157 Fed. 178. 84 C. C. A. 626

§ 6. Liabilities for injuries to third persons.

A subordinate corporation contracted with an electric illuminating company, which controlled a number of plants, for all its work of reparation and rebuilding, and in the contract agreed to assume all risks in reference thereto. *Held*, that the major corporation was under no liability, either at common law or under the employer's liability statutes of Massa-

achusetts, for any injury arising to a lineman employed by the subordinate corporation in the work of reparation or rebuilding on its premises, or about its works, through the negligence of the subordinate corporation.

—*Munroe v. Fred T. Ley & Co.*, 156 Fed. 468; *Same v. Edison Electric Illuminating Co. of Boston, Id.*.....84 C. C. A. 278

MAXIMS.

Of equity, see "Equity," § 1.

MEMORANDA.

Required by statute of frauds, see "Frauds, Statute of," § 2.

MERGER.

Of cause of action in judgment, see "Judgment," § 3.

MINES AND MINERALS.

Breach of agreement relating to mining claims as creating trusts, see "Trusts," § 1.

Fellow servants in mining operations, see "Master and Servant," § 2.

Ratification of tender to part owner of mining claim, see "Tender."

Redelivery of stock in mining company deposited in bank, see "Escrows."

Remedy at law affecting jurisdiction of equity to establish title to mining claim, see "Equity," § 1.

§ 1. Public mineral lands.

Instructions given in an action to recover possession of a mining claim, relating to the questions of discovery of mineral and possession, considered, and held not erroneous as applied to the evidence.

—*Charlton v. Kelly*, 156 Fed. 433.....84 C. C. A. 295

An instruction that, to constitute a discovery of gold sufficient to support a location of a gold placer mining claim as against an adverse mineral locator, the gold found must be of such character and quantity and found under such circumstances as to justify a man of ordinary prudence in the expenditure of time and money in the development of the property, is not erroneous; the word "development," as so used, being the equivalent of "exploration."

—*Charlton v. Kelly*, 156 Fed. 433.....84 C. C. A. 295

Under Rev. St. § 2324 [U. S. Comp. St. 1901, p. 1426], which requires that a mining location "must be distinctly marked on the ground so that its boundaries can be readily traced," no particular method of marking is required, and what is sufficient may depend on the topography of the ground; it being a question of fact in each case whether the lines are so marked that they can be readily traced by a person making a reasonable effort to do so.

—*Charlton v. Kelly*, 156 Fed. 433.....84 C. C. A. 295

The distinguishing test which determines whether or not a valuable mineral deposit may be secured by a lode claim or by a placer claim is the form and character of the deposit. If it is in a vein or lode in rock in place, it may be secured by a lode claim, and it may not be by a placer claim. If it is not in a vein or lode in rock in place, it may be secured by a placer claim, and may not be by a lode claim.

—*Webb v. American Asphaltum Min. Co.*, 157 Fed. 203..84 C. C. A. 651

The words "other valuable deposits" in the clause "mining claims upon veins or lodes of quartz, or other rock in place bearing gold, silver, cinn-

bar, lead, tin, copper, or other valuable deposits" in section 2320, Rev. St. [U. S. Comp. St. 1901, p. 1421], includes nonmetalliferous, as well as metalliferous, deposits.

—Webb v. American Asphaltum Min. Co., 157 Fed. 203.....
84 C. C. A. 651

Asphaltum in lodes or veins in rock in place may be entered and patented by means of lode mining claims under section 2320, Rev. St. [U. S. Comp. St. 1901, p. 1424], and it may not be secured by means of placer claims under section 2329, nor under Act Feb. 11, 1897, c. 216, 29 Stat. 526 [U. S. Comp. St. 1901, p. 1434], regarding the entry of lands containing petroleum or other mineral oils.

—Webb v. American Asphaltum Min. Co., 157 Fed. 203.....
84 C. C. A. 651

§ 2. Title, conveyances, and contracts.

A judgment in favor of the lessees of certain mine dumps, which they were to work over for mineral on a royalty basis, against the lessor, for an alleged violation of the lease in excluding plaintiffs from the property, *held* not supported by the evidence, a preponderance of which showed that the work had been abandoned by the lessees because they found it unprofitable.

—Bunker Hill Mining & Concentrating Co. v. Safford, 156 Fed. 446
84 C. C. A. 308

MISREPRESENTATION.

See "False Pretenses"; "Fraud."

MISTAKE.

As ground for correction of judgment, see "Judgment," § 1.

MORTGAGES.

Estoppel to enforce mortgage, see "Estoppel," § 1.

Judgment in state court as bar to suit in United States court to cancel mortgage, see "Judgment," § 3.

§ 1. Requisites and validity.

Two partners in a manufacturing business who owned the real estate used therein as equal tenants in common entered into a contract by which one retired from active participation in the business but remained as a silent partner for a term of five years, leaving the most of his capital invested. He also conveyed to his partner his half interest in the real estate "as a basis of credit," but took a bond for its reconveyance absolutely and unconditionally at the end of the term without subjecting it, as between the parties, to the risks of the business. After the expiration of the term, when he had become entitled to a reconveyance but had not received it, he executed a mortgage on his interest in the real estate to secure a valid indebtedness. *Held*, that such real estate was not property of the partnership but of the individual partners; that the mortgagor was the equitable owner of a half interest therein which was mortgageable as real estate, and that the mortgage given was valid, no rights of partnership creditors having intervened, and was entitled to record under Gen. St. Kan. 1901, § 1221, if not as a technical mortgage, as "an instrument in writing" affecting real estate, which record was constructive notice to all subsequent purchasers of its contents.

—Clark v. Lyster, 155 Fed. 513.....84 C. C. A. 27

MOTIONS.

For correction of judgment, see "Judgment," § 1.

Presentation of objections for review, see "Appeal and Error," § 2.

MUNICIPAL CORPORATIONS.

See "Counties."

Jurisdiction of United States court to enjoin enforcement of municipal ordinance, see "Courts," § 2.

§ 1. Use and regulation of public places, property, and works.

Civ. Code Cal. § 499, provides that "two lines of street railway, operated under different managements, may be permitted to use the same street, each paying an equal portion for the construction of the tracks and appurtenances used by said railways jointly; but in no case must two lines of street railway, operated under different managements, occupy and use the same street or tracks for a distance of more than five blocks consecutively." *Held*, that such provision does not deprive the municipal authorities of a city of power to grant to two railways, having tracks of different width, the right to operate their cars on the same street for a distance not exceeding five blocks, each occupying the middle of the street, and each paying an equal portion of the cost of paving between and beside the tracks as required by section 498.

—San Jose-Los Gatos Interurban Ry. Co. v. San Jose Ry. Co., 156 Fed. 455.....84 C. C. A. 265

§ 2. Fiscal management, public debt, securities, and taxation—Bonds and other securities, and sinking funds.

The absence of a recital in municipal bonds that the conditions to their issue have been complied with does not deprive them of their character of negotiable instruments, nor of the benefit of the ordinary presumptions which attend such instruments.

—Quinlan v. Green County, Ky., 157 Fed. 33.....84 C. C. A. 537

Where a proposition adopted by a vote of a county to subscribe for stock of a railroad company, to aid in the construction of its proposed road and to issue negotiable bonds of the county therefor, contained a provision that the subscription should be on condition that the company should locate and construct its road through the county, and should expend the amount subscribed within the limits of the county, such provision did not create a condition precedent to the issuance of the bonds, but the acceptance of the subscription imposed an obligation on the company to perform the condition subsequently, the failure to fully comply with which would not invalidate the bonds in the hands of a bona fide holder.

—Quinlan v. Green County, Ky., 157 Fed. 33.....84 C. C. A. 537

NAMES.

See "Trade-Marks and Trade-Names."

NATURALIZATION.

False swearing in naturalization proceedings, see "Perjury," §§ 1, 2.

Jurisdiction of United States court of offense of false swearing in naturalization proceedings, see "Criminal Law," § 1.

Testimony of accomplices and codefendants in prosecution for giving false testimony in naturalization proceedings, see "Criminal Law," § 9.

NEGLIGENCE.

Causing death, see "Death," § 1.

By particular classes of persons.

See "Carriers," § 2; "Railroads," §§ 1-3.

Bailee, see "Bailment."

Employers, see "Master and Servant," §§ 2-5.

Condition or use of particular species of property, works, machinery, or other instrumentalities.

See "Railroads," §§ 1-3.

Demised premises, see "Landlord and Tenant," § 2.

Contributory negligence.

As question for jury, see "Negligence," § 2.

Of person killed by operation of railroad, see "Railroads," §§ 1, 2.

Of servant, see "Master and Servant," §§ 4, 5.

§ 1. Acts or omissions constituting negligence.

The petition, in an action against the lessee of a theater for a personal injury, alleged that among the appliances of the theater of which defendant had control was a fire extinguisher, which was kept on the sill of an open window at the side of the stairway leading to the gallery of the theater, that it was unsecured, and was in a place where men and boys in crowding down the stairway, as was usual at the close of a performance, were likely to knock it out of the window, as they in fact did, and that it fell and injured plaintiff, who was on the walk below. There was evidence tending to support such allegations. *Held*, that the petition and evidence made a case of negligence which was properly submitted to the jury.

—*Stair v. Kane*, 156 Fed. 100.....84 C. C. A. 126

§ 2. Actions.

The petition in an action against the lessee of a theater for a personal injury alleged that among the appliances of the theater of which defendant had control was a fire extinguisher which was kept on the sill of an open window at the side of the stairway leading to the gallery of the theater; that it was unsecured, and was in a place where men and boys, in crowding down the stairway, as was usual at the close of a performance, were likely to knock it out of the window, as they in fact did, and that it fell and injured plaintiff, who was on the walk below. *Held*, that the occurrence of such an accident may be regarded, in the absence of explanation, as proof of the negligence charged.

—*Stair v. Kane*, 156 Fed. 100.....84 C. C. A. 126

Plaintiff was working for a contractor who was installing a sprinkler system in defendant's mill, and while he was making a pipe connection, standing with one foot on a ladder and the other against a post, aside a revolving shaft, his clothing was caught by a set screw which projected from a safety collar on the shaft, and he was thrown to the floor and injured. It was shown that, by erecting a platform on which to stand, plaintiff could have done the work in safety, and also that the shaft would have been stopped if required. There was also testimony that the purpose of the safety collar was to protect a person working near from coming in contact with the set screw, and that, if the latter was properly adjusted to the collar, there was no danger from it; also that, while plaintiff saw the collar and knew that it contained a set screw, he did not know that the latter projected. *Held*, that upon such evidence the questions of defendant's negligence, plaintiff's contributory negli-

gence, and his assumption of the risk were all properly submitted to the jury.

—Columbia Box & Lumber Co. v. Drown, 156 Fed. 459..... 84 C. C. A. 269

Where reasonable men might draw different conclusions from the undisputed evidence, the question of negligence or contributory negligence is one of fact for the jury.

—Columbia Box & Lumber Co. v. Drown, 156 Fed. 459.. 84 C. C. A. 269

NEW TRIAL.

Necessity of motion for purpose of review, see "Appeal and Error," § 2.

§ 1. Grounds.

If an officer of the court, whether he has charge of the jury or not, makes to the jury during their deliberations statements calculated to influence their verdict, it is ground for a new trial; but if, under all the circumstances, it does not appear that the conduct of the officer had the effect of influencing the verdict, a new trial will not be granted on that ground.

—Charlton v. Kelly, 156 Fed. 433..... 84 C. C. A. 295

NOTICE.

Affecting bank, see "Banks and Banking," § 1.

NUNC PRO TUNC.

Order correcting judgment, see "Judgment," § 1.

OBJECTIONS.

To indictment or information, see "Indictment and Information," § 2.

OFFICERS.

Misconduct of officer of court as ground for new trial, see "New Trial," § 1.

Particular classes of officers.

See "Receivers."

Bank officers, see "Banks and Banking," § 1.

County officers, see "Counties," §§ 1, 2.

OPINIONS.

Of courts, see "Courts," § 1.

ORDERS.

Review of appealable orders, see "Appeal and Error."

PAROL EVIDENCE.

In civil actions, see "Evidence," § 4.

In criminal prosecutions, see "Criminal Law," § 8.

PARTIES.

Character ground of jurisdiction, see "Courts," § 2.

Persons entitled to sue in action for death, see "Death," § 1.

PARTNERSHIP.

Property of partnership subject to mortgage, see "Mortgages," § 1.

§ 1. The firm, its name, powers, and property.

Real estate not purchased with partnership funds does not become partnership property, though used for partnership purposes, unless there is some agreement that it shall be so considered.

—Clark v. Lyster, 155 Fed. 513.....84 C. C. A. 27

PASSENGERS.

See "Carriers," § 2.

PATENTS.

§ 1. Patentability.

To accomplish a new and useful result within the meaning of the patent law (Rev. St. § 4886 [U. S. Comp. St. 1901, p. 3382]), it is not necessary that a result before unknown should be brought about, but it is sufficient if an old result is accomplished in a new and more effective way; and, if the value and effectiveness of a machine are substantially increased by a new combination of old elements, such combination is patentable.

—St. Louis Street Flushing Mach. Co. v. American Street Flushing Mach. Co., 156 Fed. 574.....84 C. C. A. 340

That a defendant charged with infringement of a patent for a machine abandoned the machine it was previously making, and adopted that of the patent, that its engineer claimed to be the inventor thereof, and himself applied for a patent, and that the patented machine has largely superseded others previously in use for the same purposes, are all facts entitled to weight on the question of invention.

—St. Louis Street Flushing Mach. Co. v. American Street Flushing Mach. Co., 156 Fed. 574.....84 C. C. A. 340

§ 2. Applications, and proceedings thereon.

The broad scope of Rev. St. § 4915 [U. S. Comp. St. 1901, p. 3392], authorizing a suit in equity to establish the right to a patent, was in no way limited or qualified by Act Feb. 9, 1893, c. 74, 27 Stat. 434 [U. S. Comp. St. 1901, p. 3391], providing for appeals from the decision of the Commissioner of Patents to the Supreme Court of the District of Columbia.

—Prindle v. Brown, 155 Fed. 531.....84 C. C. A. 45

A bill filed under Rev. St. § 4915 [U. S. Comp. St. 1901, p. 3392], to establish the right of complainant to a patent which alleges that "before the sixth day of June 1900" complainant "was the true, original, and first inventor" of the device in issue, that on that day he filed his application for a patent therefor, and that on May 28, 1900, defendant filed an application for the same invention on which after interference proceedings he was awarded a patent, is not fatally defective on general demurrer.

—Prindle v. Brown, 155 Fed. 531.....84 C. C. A. 45

A bill which states the date of an application for a patent is not to be held to state that the invention was then first completed or reduced to practice unless nothing is alleged showing invention prior thereto, and a further allegation that the invention was made prior to such date

covers the fact of reduction to practice, and is sufficient to carry the date back of the application.

—Prindle v. Brown, 155 Fed. 531.....84 C. C. A. 45

Where the essence of an invention is the location, form, size, or any other characteristic of the means employed, the patentee must distinctly specify the peculiarities in which his invention is to be found.

—American Lava Co. v. Steward, 155 Fed. 731.....84 C. C. A. 157

While it is competent, when the circumstances permit it, for an inventor in describing a machine or apparatus which he has devised to make a claim for a process which his patented device is capable of carrying out, to entitle him to do so, the process must be one capable of being carried out by other means, otherwise the claim is merely for a function of the machine; and, unless such other means are known or are within the reach of ordinary skill or judgment, the patentee is bound to point them out.

—American Lava Co. v. Steward, 155 Fed. 731.....84 C. C. A. 157

An amendment to an application for a patent made to introduce a new theory of the invention, and which contains new claims covering a process based on such theory, neither of which were mentioned in the original application, if permissible as within the invention, should be verified by the oath of the inventor.

—American Lava Co. v. Steward, 155 Fed. 731.....84 C. C. A. 157

§ 3. Terms.

The claim that a British patent covering an invention also patented in the United States was taken out by an intermeddler, and was unauthorized, and therefore that its expiration did not affect the term of the American patent, cannot be sustained, where the American patentees authorized the taking out of a patent in England, and under the other circumstances named in the opinion, did not repudiate the one in fact obtained until after its expiration.

—United Shoe Machinery Co. v. Duplessis Shoe Machinery Co., 155 Fed. 842.....84 C. C. A. 76

Article 4 bis, inserted in the international convention for the protection of industrial property of March 20, 1883, by the additional convention or act of December 14, 1900, proclaimed by the President August 27, 1902 (32 Stat. 1936, 1939), as controlled and construed by Act March 3, 1903, c. 1019, 32 Stat. 1225 [U. S. Comp. St. Supp. 1905, p. 663], "to effectuate the provisions" of such additional act of convention, did not have the effect of changing the term of an existing United States patent as fixed by statute at the time of its issuance; and such a patent granted prior to January 1, 1898, and which is limited by the provisions of Rev. St. § 4887 [U. S. Comp. St. 1901, p. 3382], to the term of a prior foreign patent, is not extended by such additional act.

—United Shoe Machinery Co. v. Duplessis Shoe Machinery Co., 155 Fed. 842.....84 C. C. A. 76

§ 4. Construction and operation of letters patent.

Where an applicant for a patent repeatedly acquiesced in the rejection of broad claims and substituted therefor narrower ones until his application was granted, the owner of the patent cannot be heard to insist that the narrower claims allowed shall cover the same as the broader ones rejected.

—St. Louis Street Flushing Mach. Co. v. American Street Flushing Mach. Co., 156 Fed. 574.....84 C. C. A. 340

§ 5. Infringement.

The findings of a master as to the profits and damages recoverable from a defendant for infringement of the Cazler patent No. 696,940 for a trousers hanger *held* supported by the evidence.

—Mackie-Lovejoy Mfg. Co. v. Cazler, 157 Fed. 88.....84 C. C. A. 591

§ 6. Decisions on the validity, construction, and infringement of particular patents.

The Laass and Hey patent, No. 388,366, and the Hey patent, No. 632,527, for stamp canceling machines of the type in which the letter actuates the printing mechanism, construed, and *held* not infringed.

—International Postal Supply Co. of New York v. American Postal Machines Co., 156 Fed. 362.....84 C. C. A. 240

The French and Meyer patent, No. 412,704, for a sole sewing machine, expired September 17, 1902, with the expiration of the term of the prior British patent, No. 13,366, of 1888, granted to the same patentees for substantially the same invention.

—United Shoe Machinery Co. v. Duplessis Shoe Machinery Co., 155 Fed. 842.....84 C. C. A. 76

The Stanley patent, No. 469,809, for a system of electrical distribution, was not anticipated by the Zipernowski and Deri article published in London in 1885.

—Westinghouse Electric & Mfg. Co. v. Montgomery Electric Light & Power Co., 156 Fed. 582.....84 C. C. A. 348

The Dolan patent, No. 589,432, for an acetylene gas burner, and the process embodied therein, claims 1, 2, and 3 are void (1) for anticipation, especially by the French patent to Bullier of April 20, 1895; and, additions thereto (2), for indefiniteness of description; and (3) because they were new claims based on a new theory of the principle of the invention added by an amendment to the application made in the Patent Office which was not verified.

—American Lava Co. v. Steward, 155 Fed. 731.....84 C. C. A. 157

The Potter patent, No. 689,906, for a detonating device for exploding toy torpedoes, is void for lack of invention and anticipation.

—Potter v. Lake Shore Novelty Co., 155 Fed. 278.....84 C. C. A. 166

The Ottofy patent, No. 795,059, for a street flushing cart, covers a device for scouring and flushing streets by forcing water under pressure from a tank located on a moving cart, connected by a pipe extending downward to near the surface of the street, forward of the rear wheels, to nozzles having narrow elongated delivery apertures, and so adjusted that the water is forced out of the apertures in a flat sheet nearly parallel with the surface of the street in a forward and lateral direction, so as to loosen up the dirt and force it away to the sides of the street, and into the gutters, without injury to the surface of the street. The combination of parts by which such result is effected was not anticipated, and discloses invention, but the patent is limited by the prior art to the combination and means shown for producing such flat stream nearly parallel to the street. As so construed *held* infringed.

—St. Louis Street Flushing Mach. Co. v. American Street Flushing Mach. Co., 156 Fed. 574.....84 C. C. A. 340

§ 7. Patents enumerated.

ENGLISH.

1888.

13,366. Sole sewing machine, cited 76

UNITED STATES.

ORIGINAL

296,488. Street flushing cart, cited 343

341,380. Stamp canceling machine, cited261, 262

388,366. Stamp canceling machine, held not infringed 260, 261, 262, 263

412,704. Sole sewing machine, held to have expired..... 76

469,809. Electrical distribution, held not anticipated..... 348

589,432. Acetylene gas burner, claims 1, 2 and 3 void for anticipation, indefiniteness of description, and because the claims were introduced by an amendment of the application not verified 157; cited 166

632,527. Stamp canceling machine, held not infringed..... 260, 261, 263

652,547. Street sprinkling machine, cited	344	736,134. Street sprinkling machine, cited	344
689,906. Detonating device for ex- ploding toy torpedoes, held void for lack of in- vention	166	736,135. Street sprinkling machine, cited	344
696,940. Trousers hanger, held valid and infringed.....	591	795,059. Street flushing cart, con- strued and held infring- ed	341

PAYMENT.

See "Tender."

Subrogation on payment, see "Subrogation."

PENALTIES.

For infringement of copyright, see "Copyrights," § 2.

PERJURY.

§ 1. Offenses and responsibility therefor.

On the trial of a defendant charged with a violation of Rev. St. § 5395 [U. S. Comp. St. 1901, p. 3654], which denounces a penalty against one who "knowingly swears falsely" in making any oath under any law relating to naturalization, it is sufficient to warrant conviction if defendant knowingly and willfully testified falsely, and it is not necessary that his act should also have been corrupt or malicious.

—Holmgren v. United States, 156 Fed. 439.....84 C. C. A. 301

To support an indictment for subornation of perjury based on the alleged procurement of the making of a false affidavit or oath before the receiver or register of a land office in support of an application to enter land under the homestead law, it is not essential that the affidavit should have been subscribed as well as sworn to before such officer.

—Nurnberger v. United States, 156 Fed. 721.....84 C. C. A. 377

§ 2. Prosecution and punishment.

Instructions on the trial of a defendant charged with perjury in naturalization proceedings, under Rev. St. § 5395 [U. S. Comp. St. 1901, p. 3654], considered and approved.

—Holmgren v. United States, 156 Fed. 439.....84 C. C. A. 301

An indictment for subornation of perjury in procuring another to make a false oath or affidavit before the receiver of a land office to secure an entry of land, which avers that such oath or affidavit was made in support of "a certain application in writing to enter under the homestead laws of the United States, subject to entry at said land office," certain land described, is sufficient after verdict as showing that the land described was at the time public land of the United States subject to homestead entry at such land office.

—Nurnberger v. United States, 156 Fed. 721.....84 C. C. A. 377

On the trial of such an indictment, the tract book kept by the register of the land office is admissible in evidence to establish the fact that the lands to which the application related were public lands subject to homestead entry at such office, and it is competent for the register as a witness to explain the meaning of abbreviations used therein.

—Nurnberger v. United States, 156 Fed. 721.....84 C. C. A. 377

On the trial of a defendant charged with subornation of perjury in procuring homestead entrymen to make the required oath that the entry was not made for the benefit of any other person, when in fact they had agreed to convey the land to defendant for a stipulated price as soon as

they obtained title, it was error to refuse to permit defendant to testify that he made no such agreements, but that the agreements actually made, as he understood them, left the conveyance optional with the other parties or to other facts, which tended to show that his act was not willful nor corrupt, as required by the statute to constitute the crime charged.

—Nurnberger v. United States, 156 Fed. 721.....84 C. C. A. 377

Instructions, given on the trial of a defendant charged with subornation of perjury in procuring homestead entrymen to make false oaths, held erroneous and misleading, in that they authorized the jury to convict in case they found that any statement made by affiants in their affidavits was false and was intentionally sworn to, when there was evidence tending to show that some of the recitals in the affidavits respecting the intention to reside on and improve the land as affiants understood the law were not applicable to their entries, and that their act in swearing to the same was not therefore willful and corrupt, as required by Rev. St. § 2291, as amended by Act March 3, 1877, c. 122, § 2, 19 Stat. 404 [U. S. Comp. St. 1901, p. 1391], to constitute the crime of perjury.

—Nurnberger v. United States, 156 Fed. 721.....84 C. C. A. 377

PERSONAL INJURIES.

Liability of receiver, see "Receivers," § 2.

Particular causes or means of injury.

See "Negligence."

Operation of railroads, see "Railroads," §§ 1, 2.

Particular classes of persons injured.

Employé, see "Master and Servant," §§ 2-5.

Traveler on highway crossing railroad, see "Railroads," § 2.

Trespasser on demised premises, see "Landlord and Tenant," § 2.

Remedies.

Construction of instructions, see "Trial," § 2.

Evidence of damages, see "Damages," § 1.

Pleading damages, see "Damages," § 1.

Relevancy of evidence, see "Evidence," § 2.

PETITION.

In bankruptcy, see "Bankruptcy," § 1.

In pleading, see "Pleading," § 2.

PLEA.

In civil actions, see "Pleading," § 3.

In criminal prosecutions, see "Criminal Law," § 4.

PLEADING.

Admissions in pleading as evidence, see "Evidence," § 3.

Allegations as to particular facts, acts, or transactions.

See "Damages," § 1; "Release," § 2.

Statute of limitations, see "Limitation of Actions," § 2.

In particular actions or proceedings.

See "Ejectment," § 1; "Equity," § 3; "Fraud," § 2.

For unfair competition, see "Trade-Marks and Trade-Names," § 2.

Indictment or criminal information or complaint, see "Indictment and Information."

Pleas in criminal prosecutions, see "Criminal Law," § 4.

§ 1. Form and allegations in general.

Where plaintiff deposited money to indemnify his sureties on injunction bonds against loss on account of a judgment rendered against them and plaintiff on such bonds, a complaint to recover such money from the depository does not state a cause of action, where it alleges merely that the judgment was satisfied on the docket by the clerk of the court on return of an execution issued thereon "fully satisfied"; there being no allegation that the judgment has been in fact paid and satisfied. Nor is such complaint made good by an allegation that the sureties are not liable on such judgment, which is a mere conclusion of law.

—*Cambers v. First Nat. Bank of Butte*, 156 Fed. 482. 84 C. C. A. 292

§ 2. Declaration, complaint, petition, or statement.

A declaration, in an action to recover for a tort committed by railroad receivers, against a purchaser which succeeded to the property, is not bad for duplicity because it alleges as grounds of liability an express assumption of liability for all claims against the receivership, and also that the defendant succeeded to betterments and improvements made by the receivers from earnings of the receivership which were liable for plaintiff's claim.

—*Gray v. Grand Trunk Western Ry. Co.*, 156 Fed. 736.
84 C. C. A. 392

§ 3. Plea or answer, cross-complaint, and affidavit of defense.

An answer construed, and, although lacking in clearness of statement, held to sufficiently plead a counterclaim as against a general demurrer.

—*Fish v. First Nat. Bank, of Seattle, Wash.*, 157 Fed. 87.
84 C. C. A. 502

POLICY.

Of insurance, see "Insurance."

POSSESSION.

See "Adverse Possession."

To sustain suit to quiet title, see "Quieting Title," § 1.

POST OFFICE.

§ 1. Offenses against postal laws.

A scheme by which certificates are issued by a corporation, on each of which the holder agrees to pay \$1 per week, subject to forfeiture for non-payment, and about 75 per cent. of which payments are paid into a "mutual benefit credit fund" until all certificates prior in date have matured and been canceled, when his own certificate shall mature, and he shall be paid from such fund the sum of \$2 for each week such certificate has been in force, provided there is so much in the fund, not exceeding however \$100, is a lottery within the meaning of Rev. St. § 3894 [U. S. Comp. St. 1901, p. 2659], and any person engaged in conducting such scheme by means of letters or circulars sent through the mails is guilty of a criminal offense under said section.

—*Fitzsimmons v. United States*, 156 Fed. 477.84 C. C. A. 257

PRACTICE.

Adoption by United States courts of practice of state courts, see "Courts," § 2.
In patent office, see "Patents," § 2.

In particular civil actions or proceedings.

See "Contempt," § 1; "Divorce," § 1; "Ejectment."

Particular proceedings in actions.

See "Damages," § 1; "Evidence"; "Judgment"; "Limitation of Actions"; "Pleading"; "Removal of Causes"; "Trial."

Particular remedies in or incident to actions.

See "Injunction"; "Receivers"; "Tender."

Procedure in criminal prosecutions.

See "Criminal Law."

Procedure in exercise of special or limited jurisdiction.

In bankruptcy, see "Bankruptcy," § 1.
In equity, see "Equity."

Procedure in or by particular courts or tribunals.

See "Courts."

Procedure on review.

See "Appeal and Error"; "New Trial."

PREFERENCES.

Effect of proceedings in bankruptcy, see "Bankruptcy," §§ 2, 7.

PREJUDICE.

Ground for reversal in civil actions, see "Appeal and Error," § 2.

PRELIMINARY INJUNCTION.

See "Injunction," § 1.

PRESUMPTIONS.

On appeal or error, see "Appeal and Error," § 6.

PRINCIPAL AND AGENT.

See "Attorney and Client"; "Brokers."

Burden of proof in action by corporation against agent, see "Evidence," § 1.
Deposits in bank by agent, see "Banks and Banking," § 1.

PRINCIPAL AND SURETY.

Subrogation of surety to rights of creditor, see "Subrogation."

PRIVILEGED COMMUNICATIONS.

Disclosure by witness, see "Witnesses," § 2.

PROCESS.

Particular forms of writs, see "Injunction"; "Mandamus."

PROFITS.

Accounting as to, in suit to restrain unfair competition, see "Trade-Marks and Trade-Names," § 2.

Recovery in suit for infringement of patents, see "Patents," § 5.

PROPERTY.

Community property, see "Husband and Wife," § 1.

Particular species of property.

See "Copyrights"; "Literary Property"; "Logs and Logging"; "Mines and Minerals"; "Shipping"; "Trade-Marks and Trade-Names."

Transfers and other matters affecting title.

See "Adverse Possession."

Taking for public use, see "Eminent Domain."

PROSTITUTION.

See "Disorderly House."

PROVINCE OF COURT AND JURY.

In criminal prosecutions, see "Criminal Law," § 10.

PUBLIC DEBT.

See "Counties," § 2; "Municipal Corporations," § 2.

PUBLIC LANDS.

Mineral lands, see "Mines and Minerals," § 1.

Regulations of land office as documentary evidence, see "Criminal Law," § 8.

§ 1. Disposal of lands of the states.

The provision of Acts Tenn. 1824, c. 22, § 6, making unlawful an entry of state land on which another resided or which was occupied by him, unless he was given 30 days' notice, was intended solely for the protection of the occupier, by enabling him to exercise his prior right to enter the land; and an entry made without giving such notice to an occupier of part of the land is void only as to such part. The notice might, moreover, be waived by an occupier, and was so waived in a case where for a valuable consideration he agreed to attorn to the entryman and hold possession for him until the grant was secured.

—Bell v. North American Coal & Coke Co., 155 Fed. 712.....

84 C. C. A. 60

PUBLIC SERVICE CORPORATIONS.

See "Carriers"; "Railroads."

PUBLIC USE.

Taking property for public use, see "Eminent Domain."

PUNISHMENT.

Violation of injunction, see "Injunction," § 2.

QUESTIONS FOR JURY.

In criminal prosecutions, see "Criminal Law," § 10.

QUIETING TITLE.

§ 1. Right of action and defenses.

A suit in equity cannot be maintained by one out of possession to determine title or right of possession to lands, or to remove a cloud from complainant's title against a claimant in possession.

—*Johnston v. Corson Gold Min. Co.*, 157 Fed. 145. . . . 84 C. C. A. 593

RAILROADS.

As employers, see "Master and Servant."

Carriage of goods and passengers, see "Carriers."

Duplicity in pleading in action for tort committed by railroad receivers, see "Pleading," § 2.

Exercise of power of eminent domain, see "Eminent Domain," § 1.

Liability on county bonds issued in aid of railroad, see "Counties," § 2.

Sale of stock of railroad company, see "Corporations," § 1.

§ 1. Operation—Accidents to trains.

Act Pa. April 4, 1868 (P. L. 58), which provides that, when any person shall sustain personal injury or loss of life while lawfully engaged or employed "on or about the road, work, depots and premises of a railroad company" of which company such person is not an employé or passenger, the right of action and recovery shall be the same as would exist if such person were an employé, does not prevent a recovery from a railroad company for the death of an engineer in the employ of another company, who, while running a train of such company over a track of defendant, under an agreement which gave it the right of way, was killed in a collision with a train of defendant negligently being run upon the same track, since the track was not at the time the premises of defendant, whose train was there without right, but of the lessee.

—*Philadelphia & R. R. Co. v. Baker*, 155 Fed. 407. . . . 84 C. C. A. 86

The charge of the court, in an action to recover for the death of a railroad engineer, killed in a collision between his train and a train of defendant company, *held* to have fairly submitted to the jury the question of contributory negligence.

—*Philadelphia & R. R. Co. v. Baker*, 155 Fed. 407. . . . 84 C. C. A. 86

§ 2. — Accidents at crossings.

A street car in Chicago was stopped at a railroad crossing, and the conductor went forward, as required by the rules, to give the signal to

the motorman when the crossing was clear. There were six railroad tracks; the first being a side track on which some freight cars were standing near the crossing, and the second the outbound passenger track. There were two inbound trains approaching on the further tracks, so that the crossing could not then be made, and while waiting the conductor was struck and killed by the engine of an outbound passenger train on the second track. The tracks were eight feet apart, and, by standing next to the side track in a place of safety, he could have seen approaching trains on any of the other tracks; outbound trains being visible for 600 feet before reaching the crossing. He was familiar with the crossing, and knew that the outbound train was due, and usually waited for it to pass at that time each day. *Held*, that in unnecessarily going upon the track while waiting he was guilty of negligence which at least contributed to his death, and precluded a recovery therefor as matter of law, regardless of the question of the negligence of the railroad company.

—Casey v. Chicago, M. & St. P. Ry. Co., 157 Fed. 66...84 C. C. A. 570

The placing of gates or the stationing of flagmen at railroad crossings in a city are not duties imposed by statute or municipal ordinance on railroad companies, or voluntarily assumed by them, for the purpose of relieving the traveler on the street from taking those precautions for his own safety required by the long-settled rule of law, but as additional precautions to meet the increased peril resulting from local conditions in cities; and open gates, or a signal from a flagman to cross, do not relieve a traveler from the duty to look and listen before entering upon the tracks.

—Union Pac. R. Co. v. Rosewater, 157 Fed. 168.....84 C. C. A. 616

Where plaintiff, who was driving upon a city street in the evening, on approaching a railroad crossing having four tracks, stopped on signal of the flagman before reaching the first track, and waited until some engines had passed, and then in obedience to a signal of the flagman started on after first looking and listening, and was struck by a train on the second track, the question whether or not he was guilty of contributory negligence in failing to continue to look and listen after starting across was not one of law but of fact, to be determined by the jury, in view of the circumstances of the particular case.

—Union Pac. R. Co. v. Rosewater, 157 Fed. 168.....84 C. C. A. 616

§ 3. — Injuries to persons on or near tracks.

A child five years old was struck by a railroad engine, so as to break in his skull, exposing and crushing parts of the brain. He breathed for three-quarters of an hour after, and at times moaned. *Held*, that in a common-law action by his administrator to recover damages for his suffering resulting from his injury, which right of action survived to plaintiff by statute, evidence of such facts was insufficient to show that the child in fact suffered or to authorize a recovery.

—Grand Trunk Ry. Co. of Canada v. Flagg, 156 Fed. 359.....
84 C. C. A. 263

A railroad company owes no duty of care to a trespasser on its track, except to refrain from his willful or wanton injury, and cannot be held liable for the injury of a child so trespassing, where the engineer of the train which struck him testified that he came upon the track so short a distance ahead of the engine that it was impossible to stop the train before striking him, and where the engineer's testimony was uncontradicted, except by evidence which at most could no more than raise a probability that the child had walked for some distance on the track.

—Grand Trunk Ry. Co. of Canada v. Flagg, 156 Fed. 359.....
84 C. C. A. 263

RATIFICATION.

Of tender, see "Tender."

REAL ACTIONS.

See "Ejectment."

REBATES.

By carrier, see "Carriers," § 1.

RECEIVERS.

Duplicity in pleading in action for tort committed by railroad receivers, see "Pleading," § 2.

Of corporations in general, see "Corporations," § 2.

§ 1. Management and disposition of property.

Where by the local law the obligation assumed by a successor or purchaser who takes over property or a fund from a receivership, with assumption of liabilities, is one of direct liability, and not merely equitable, for the payment of claims chargeable against the property or fund, such local law fixes the nature of the cause of action for the enforcement of such liability in a federal court, and an action at law may be maintained in such court against the purchaser alone to recover for a personal injury for which the property in the hands of the receiver was chargeable.

—Gray v. Grand Trunk Western Ry. Co., 156 Fed. 736.....
84 C. C. A. 392

§ 2. Actions.

It is the settled doctrine of the federal courts that a receiver is not personally liable for injuries arising through negligent operation of the property not due to his personal negligence, but an action against him for such injuries is in law one against the receivership in which the judgment recovered can be enforced only against the property or funds in his hands, and which cannot be maintained after the receivership has been closed and the receiver discharged.

—Gray v. Grand Trunk Western Ry. Co., 156 Fed. 736.....
84 C. C. A. 392

REFORMATION OF INSTRUMENTS.

See "Cancellation of Instruments."

REHEARING.

See "New Trial."

RELEASE.

Pleading in suit against corporation to cancel release, see "Equity," § 3.

§ 1. Requisites and validity.

The only fraud which may be availed of in an action at law in a federal court to avoid a formally executed release of the claim sued on is misrepresentation, deceit or trickery practiced to induce the execution of a release which the signer never intended to execute and upon which the minds of the contracting parties never met, and does not include any of those misrepresentations of fact which may have been resorted to in order to persuade the claimant to agree to the release as actually made. In such respect it is immaterial whether the release is or is not under seal.

—Pacific Mut. Life Ins. Co. of California v. Webb, 157 Fed. 155.....
84 C. C. A. 603

§ 2. Pleading, evidence, trial, and review.

In an action on an accident insurance policy in which a formal release of the claim executed by defendant for a stated consideration was pleaded as a defense, a replication which in effect denied that plaintiff executed a release but alleged that if she did it was procured by fraud and deceit in that defendant's agents represented to her that defendant was not liable on the policy and read affidavits to her purporting to state facts, known to them to be untrue, in support of such representation, whereby she was induced to accept a sum of money from defendant which purported to be a gift, does not state such a case of fraud as would avoid the release at law.

—Pacific Mut. Life Ins. Co. of California v. Webb, 157 Fed. 155.....
84 C. C. A. 603

RELEVANCY.

Of evidence in civil actions, see "Evidence," § 2.

REMEDY AT LAW.

Effect on jurisdiction of equity, see "Equity," § 1.

REMOVAL OF CAUSES.**§ 1. Citizenship or alienage of parties.**

Every corporation of every state has the absolute right to remove to the federal courts its suits in any other states in the cases and on the terms prescribed by the acts of Congress.

—Butler Bros. Shoe Co. v. United States Rubber Co., 156 Fed. 1...
84 C. C. A. 167

REMOVAL OF CLOUD.

See "Quieting Title."

REPEAL.

Of statute, see "Statutes," § 1.

RESCISSION.

Cancellation of written instrument, see "Cancellation of Instruments."
Of contract for sale of goods, see "Sales," § 2.

RES JUDICATA.

See "Judgment," § 3.

RETROSPECTIVE LAWS.

Constitutional restrictions, see "Constitutional Law," § 1.

REVENUE.

See "Customs Duties"; "Internal Revenue"; "Taxation."

REVIEW.

See "Appeal and Error"; "Criminal Law," §§ 12, 13.
Bill in equity, see "Equity," § 4.

RISKS.

Assumed by employé, see "Master and Servant," §§ 3, 5.

ROADS.

Streets in cities, see "Municipal Corporations," § 1.

SALES.

In bankruptcy proceedings, see "Bankruptcy," § 3.

Of corporate stock, see "Corporations," § 1.

Of logs, see "Logs and Logging."

Parol or extrinsic evidence affecting contract of sale, see "Evidence," § 4.

Receiver's sales, see "Receivers," § 1.

§ 1. Construction of contract.

In accepting an offer made by plaintiff to furnish a quantity of cotton, defendant wrote as follows: "We understand this cotton is to be full 1½ inch staple, same as the staple in the 25 bale sample lot you shipped to us, the grade to be average strict middling, nothing middling. We desire that you be particular in the selection of this cotton as nothing less than full 1½ inch, same type as the sample lot will be suitable to us." *Held*, that the contract so made required the cotton sold to be of the same grade as the sample lot of 25 bales, and that, where plaintiff admitted that the cotton shipped thereunder was not of such grade, it could not recover for breach of the contract by defendant in refusing to accept the same.

—Lydia Cotton Mills v. Prairie Cotton Co., 156 Fed. 225.....
84 C. C. A. 129

Defendant sold and agreed to deliver to plaintiff 100,000 barrels of cement, and plaintiff to receive and pay for the same. One-half was to be delivered the first year, and the remainder the following year, at either one of two ports on Lake Superior, at plaintiff's option. The contract contained the following provision: "Shipments to be made [by defendant] after navigation opens and continue throughout the season in 5,000 to 10,000 barrel lots as required by said second party [plaintiff]; shipments to be made on or before October 15th of each year. Said second party shall give 30 days' notice of shipments to be made, in advance." *Held*, that such provision contemplated shipments by water in 5,000 to 10,000 barrel lots throughout the season; that the provision for notice was for the benefit of both parties, and required plaintiff to give 30 days' notice in advance of each of such shipments, especially in view of another provision for tests of the cement requiring 28 days' time, and the taking of samples for such tests at the factory "approximately on the date that notice of shipment is given."

—Alpena Portland Cement Co. v. Backus, 156 Fed. 944.....
84 C. C. A. 444

§ 2. Modification or rescission of contract.

Defendant sold and agreed to deliver to plaintiff 100,000 barrels of cement, and plaintiff to receive and pay for the same. One-half was to be delivered the first year, and the remainder the following year, at either one of two ports on Lake Superior, at plaintiff's option. The contract contained the following provision: "Shipments to be made [by defendant] after navigation opens, and continue throughout the season, in 5,000 to 10,000 barrel lots, as required by said second party [plaintiff]; shipments to be made on or before October 15th of each year. Said second party shall give 30 days' notice of shipments to be made, in advance." *Held*, that the failure of plaintiff to order and give the notices provided for, covering the quantity deliverable the first season, at least

30 days before October 15th, was equivalent to a failure to take and receive, and justified defendant in rescinding the contract.

—Alpena Portland Cement Co. v. Backus, 156 Fed. 944.....
84 C. C. A. 444

Defendant was not estopped to rescind because of letters written after plaintiff's default in ordering, expressing a desire for performance during the following season, where plaintiff did not accede, but insisted upon immediate further shipment without the notice to which defendant was entitled.

—Alpena Portland Cement Co. v. Backus, 156 Fed. 944.....
84 C. C. A. 444

§ 3. Conditional sales.

A manufacturing corporation of New Jersey made annual contracts with a Colorado corporation, engaged in the wholesale business in that state, whereby it agreed to send to the corporation in Colorado rubber goods for sale, which the latter agreed to store and to sell in its name as consignee, and to pay for the goods, when sold, certain prices, which were so much less than its selling prices that it secured thereby the expenses of the business and a liberal commission. The contracts provided that the latter was the agent of the former to sell the goods; that the latter should make advances when requested; that to the amount of its profits it guaranteed the sales; that the goods and their proceeds, until the latter paid the agreed prices, should be the property of the former; and that the latter assumed the risk of the receiving, handling, and selling. The manufacturing corporation shipped its goods. It had no office or place of business in Colorado, and neither incurred nor paid any of the expenses. The Colorado corporation sold the merchandise at its own expense, in consideration of the factorage. *Held*, that the agreements were factorage contracts and not conditional sales.

—Butler Bros. Shoe Co. v. United States Rubber Co., 156 Fed. 1...
84 C. C. A. 167

SATISFACTION.

See "Release."

SET-OFF AND COUNTERCLAIM.

Pleading matter of set-off or counterclaim, see "Pleading," § 3.

SETTLEMENT.

See "Release."

SHIPPING.

See "Collision."

§ 1. Charters.

Under a charter party which required the owner to provide the crew, and provided that, in case of loss of time from deficiency of men, the hire should cease during the detention, the charterer is entitled to a deduction of charter hire during the time the vessel was detained at quarantine in consequence of the illness and infection of the crew, and the requirement of the quarantine officers that a new crew should be shipped before she was permitted to enter the port.

—Tweedie Trading Co. v. George D. Emery Co., 154 Fed. 472.....
84 C. C. A. 253

§ 2. General average.

While the parties to a shipping contract may by clearly expressed terms either enlarge or limit the carrier's liability in respect to general average,

It is the settled rule that stipulations in bills of lading, exempting the carrier from liability for damage or losses arising from certain specified causes, do not affect his liability in general average contribution, although the loss may occur from one or more of the excepted causes.

—The Santa Ana, 154 Fed. 800.....84 C. C. A. 312

If a master fails to retain the lien which by law he has on the goods of all shippers for their just proportion in a general average contribution, and delivers the goods without requiring payment or a general average bond or other security for the payment thereof, he and the shipowner become personally liable for the full amount of the general average contribution, which all interests should pay to the persons suffering loss.

—The Santa Ana, 154 Fed. 800.....84 C. C. A. 312

An adjustment in general average, made by an adjuster selected by the vessel, on proofs submitted by all parties, *held* not impeached by the vessel owner for fraud.

—The Santa Ana, 154 Fed. 800.....84 C. C. A. 312

Where a libel was filed to enforce a general average award made by an adjuster, and only asked for a readjustment in case objections made to the validity of the award by defendant should be sustained, the libellant cannot complain that a readjustment was not made, where such objections were overruled, and the award made by the adjuster accepted.

—The Santa Ana, 154 Fed. 800.....84 C. C. A. 312

SIGNALS.

Of vessels, see "Collision," § 2.

SINKING FUNDS.

For municipal indebtedness, see "Municipal Corporations," § 2.

STALE DEMAND.

See "Equity," § 2.

STAMP TAX.

See "Internal Revenue."

STARE DECISIS.

See "Courts," § 1.

STATEMENT.

By witness inconsistent with testimony, see "Witnesses," § 3.

STATES.

Courts, see "Courts."

Judgment in state court as bar to suit in United States court, see "Judgment," § 3.

Public lands, see "Public Lands," § 1.

Regulation of interstate commerce, see "Commerce," § 1.

State legislation affecting jurisdiction of United States courts, see "Courts," § 2.

STATUTES.

Adoption by United States courts of state laws as rules of decision, see "Courts," § 2.

Validity of retrospective or ex post facto laws, see "Constitutional Law," § 1.

Provisions relating to particular subjects.

See "Action," § 1; "Adverse Possession," § 1; "Appeal and Error," § 1; "Bankruptcy," § 4; "Carriers," § 1; "Collision," § 1; "Conspiracy," § 1; "Copyrights," § 2; "Corporations," § 3; "Counties," §§ 1, 2; "Courts," § 2; "Criminal Law," § 1; "Customs Duties"; "Death," § 1; "Disorderly House"; "Divorce," §§ 1, 2; "Indictment and Information," § 1; "Limitation of Actions" § 1; "Master and Servant," §§ 2, 5; "Mines and Minerals," § 1; "Mortgages," § 1; "Municipal Corporations," § 1; "Patents," §§ 1-3; "Perjury," § 1; "Post-Office," § 1; "Public Lands," § 1; "Railroads," § 1; "Witnesses," § 1.

Revenue laws, see "Internal Revenue."

Statute of frauds, see "Frauds, Statute of."

§ 1. Repeal, suspension, expiration, and revival.

A clause generally repealing "all laws and parts of laws in conflict with" the act of which it is part repeals nothing that would not be equally repealed without it.

—Great Northern Ry. Co. v. United States, 155 Fed. 945.
84 C. C. A. 93

The rule that a later act, covering the whole subject of a prior one and embracing new provisions, plainly showing that it was intended as a substitute, operates by implication to repeal the prior act, is subject to the qualification that where the later act expresses the extent to which it is intended to repeal prior laws, as by a clause repealing all laws and parts of laws in conflict therewith, it excludes any implication of a more extended repeal.

—Great Northern Ry. Co. v. United States, 155 Fed. 945.
84 C. C. A. 93

To establish a supersession or repeal of a statute by implication, it is not sufficient to show merely that a later statute, making no mention of the particular subject of a prior one, employs language broad enough to cover some part or all of it; for, as words are sometimes employed with less than their largest literal meaning, it must also appear that the two statutes cannot stand together, reasonable purpose and operation being accorded to each. Particularly is this true if the prior statute expresses a settled policy in legislation.

—Great Northern Ry. Co. v. United States, 155 Fed. 945.
84 C. C. A. 93

Statute law is not abrogated or annulled by mere re-enactment or repetition; and when, for purposes of enlargement, contraction, or otherwise, a statute is re-enacted or repeated with amendments, the amendatory act is to be regarded as an affirmation and continuation of the prior law, in so far as in substance and operation it is the same, and is to be regarded as new legislation only in so far as in substance or operation it differs from the prior law.

—Great Northern Ry. Co. v. United States, 155 Fed. 945.
84 C. C. A. 93

§ 2. Construction and operation.

When a legislative act is general in its terms, the title may be resorted to for the purpose of ascertaining its proper limitations.

—United Shoe Machinery Co. v. Duplessis Shoe Machinery Co., 155 Fed. 842.
84 C. C. A. 76

While Congress may prescribe rules affecting the construction of after-legislation, which does not in terms, or by necessary implication, show that it is to be unaffected by them, these rules cannot be so framed as to defeat the plain intention of after-legislation, and, like other statutes, they cease to be effective when plainly or necessarily in conflict with a later manifestation of the legislative will.

—Great Northern Ry. Co. v. United States, [155 Fed. 945](#).....
[84 C. C. A. 93](#)

As applied to subsequent repealing acts which do not expressly, or by necessary implication, contravene its provisions, Rev. St. § [13](#) [U. S. Comp. St. 1901, p. [6](#)], prescribing the effect of a repealing act upon existing penalties, forfeitures, and liabilities, is effective and obligatory upon the courts; but beyond this it is without effect and not obligatory upon any one. Notwithstanding its enactment, Congress remained at liberty to legislate respecting its subject-matter in any manner it might choose.

—Great Northern Ry. Co. v. United States, [155 Fed. 945](#).....
[84 C. C. A. 93](#)

The intention of the Legislature constitutes the law, and may be as effectually manifested by what is necessarily implied as by what is expressed; and, where there are conflicting manifestations of the legislative will, the last is controlling, even though it rests in necessary implication.

—Great Northern Ry. Co. v. United States, [155 Fed. 945](#).....
[84 C. C. A. 93](#)

The scope of a proviso is to be determined by its words and import, rather than by its connection with a subdivision of the statute; and a proviso contained in a paragraph of a tariff act may be construed to relate to other provisions also.

—United States v. Scruggs, Vandervoort & Barney Dry Goods Co.,
[156 Fed. 940](#).....[84 C. C. A. 440](#)

In cases of doubt and uncertainty as to the meaning of a compiled or revised statute, resort may properly be had to the original enactments.

—Thomas v. United States, [156 Fed. 897](#); Taggart v. Same, Id.,....
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STATUTES CONSTRUED.

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STREET RAILROADS.

See "Railroads."

STREETS.

See "Municipal Corporations," § 1.

SUBORNATION.

Of perjury, see "Perjury," §§ 1, 2.

SUBROGATION.

Subrogation is not a matter of strict right, but is purely equitable in its nature, dependent upon the facts and circumstances in each particular case, and intended to serve the purpose of compelling the ultimate discharge of a debt or obligation by him who in good conscience ought to pay it.

—National Surety Co. v. State Sav. Bank, 156 Fed. 21.....
84 C. C. A. 187

The doctrine of subrogation is sufficiently broad to entitle a surety, who has paid the debt of his principal, to the remedies which the creditor had, not only against the principal, but against others.

—National Surety Co. v. State Sav. Bank, 156 Fed. 21.....
84 C. C. A. 187

A year after the issuance of such orders they were presented to the county treasurer and paid, with interest. Upon the discovery of their fraudulent character the county brought suit against the auditor on his bond, and by the final judgment of the Supreme Court of the state recovered a judgment, which was paid by the surety. *Held*, that the bank was primarily liable to the county for the amount received from its treasurer as money had and received to the county's use, and that the surety of the auditor, having paid the debt to the county, was entitled by equitable subrogation to enforce its right of recovery against the bank.

—National Surety Co. v. State Sav. Bank, 156 Fed. 21.....
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SUIT.

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Collection of taxes, see "Taxation," § 1.

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TAXATION.

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Right to acquire tax title to property of bankrupt without leave of court, see "Bankruptcy" § 2.

§ 1. Collection and enforcement against persons or personal property.

A tax is not a "debt" within the ordinary meaning of the term, nor in such sense that an action of indebitatus assumpsit may be maintained for its collection, unless expressly authorized by statute.

—United States v. Chamberlin, 156 Fed. 881.....84 C. C. A. 461

TELEGRAPHS AND TELEPHONES.

Competency of clerk of district foreman of telephone company to testify as to duties of sub-foreman, see "Witnesses," § 1.

TENDER.

A tender to a part owner of a mining claim of a sum which he claimed to be due him for assessment work from a co-tenant, made by a friend of the latter for the purpose of preventing a forfeiture of his rights under the statute, although not authorized at the time, is valid and effective, where it was ratified at once when made known to the person in whose behalf it was made.

—*Forderer v. Schmidt*, 154 Fed. 475.....84 C. C. A. 426

TERMS.

Of leases, see "Landlord and Tenant," § 1.

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THEATERS AND SHOWS.

Liability of lessee of theater for negligence, see "Negligence," § 1.

Relevancy of evidence in action against lessee of theater, see "Evidence," § 2.

THEFT.

See "Larceny."

TIMBER.

See "Logs and Logging."

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For protest by importers, see "Customs Duties," § 2.

TITLE.

Color of title, see "Adverse Possession."

Removal of cloud, see "Quieting Title."

TORTS.

Causing death, see "Death," § 1.

Duplicity in pleading in action for tort committed by railroad receivers, see "Pleading," § 2.

Liabilities of particular classes of persons.

Employés, see "Master and Servant," § 6.

Particular torts.

See "Fraud"; "Negligence"; "Waste."

Maritime torts, see "Collision."

TOWNS.

See "Counties"; "Municipal Corporations."

TRADE-MARKS AND TRADE-NAMES.

§ 1. Marks and names subjects of ownership.

Although the word "sterling" is ordinarily descriptive of quality, and is not popularly used in connection with ale, one who adopted it to identify a particular manufacture of ale may be entitled to protection against its use by another in such manner as to create confusion as to the origin or identity of the two products.

—Worcester Brewing Corp. v. Rueter & Co., 157 Fed. 217.....
84 C. C. A. 665

§ 2. Infringement and unfair competition.

Evidence considered, and *held* to establish the contention that the complainant, which was the manufacturer and proprietor of a secret remedy which it sold and used for the treatment and cure of the opium, liquor, and tobacco habits, and which it claimed and represented to the public as having as its chief and most valuable ingredient chloride of gold or "double chloride of gold," was chargeable with fraudulent misrepresentations, in that such remedy did not contain any gold or chloride of gold.

—Memphis Keeley Institute v. Leslie E. Keeley Co., 155 Fed. 964....
84 C. C. A. 112

That a complainant comes into a court of equity with unclean hands, in that he is chargeable with fraudulent misrepresentations to the public in respect to the subject-matter of the suit, is not, strictly speaking, a defense, and need not be pleaded, but, upon such fact appearing, it will be given effect by the court in the interest of the public by refusing to grant relief to the complainant.

—Memphis Keeley Institute v. Leslie E. Keeley Co., 155 Fed. 964....
84 C. C. A. 112

The proprietor of a medicine or remedy made in accordance with a secret formula, which knowingly makes false and fraudulent representations as to the ingredients of such remedy to the public through its advertisements and labels, cannot maintain a suit in equity to protect its business of selling or administering such remedy from invasion and injury by another.

—Memphis Keeley Institute v. Leslie E. Keeley Co., 155 Fed. 964....
84 C. C. A. 112

The mere making and sale of repair parts for a well-known machine, the patents on which have expired, by other than the patentee and maker of the machine, which also makes and sells such repair parts, is not an act of unfair trade, unless they are put out as the goods of the original patentee, and especially where they are unmarked, while those made by the patentee are marked with its name.

—Bender v. Enterprise Mfg. Co., 156 Fed. 641.....84 C. C. A. 353

Complainants in a suit to restrain unfair competition although it may be entitled to an injunction, *held* barred by its laches from the right to an accounting for profits.

—Worcester Brewing Corp. v. Rueter & Co., 157 Fed. 217.....
84 C. C. A. 665

§ 3. Trade-marks and trade-names adjudicated.

"Sterling."—Worcester Brewing Corp. v. Rueter & Co., 665.

TREATIES.

Treaties and statutes of the United States have always been practically put in the same class, so far as judicial action is concerned, to the extent that a later treaty has the same effect on a prior statute that a later statute has, and may supersede it as a later statute may supersede a prior treaty. Nor is there any practical distinction as between a statute and a

treaty with regard to its becoming presently effective without awaiting further legislation which depends entirely upon its terms.

—United Shoe Machinery Co. v. Duplessis Shoe Machinery Co., 155 Fed. 842.....84 C. C. A. 76

TREES.

See "Logs and Logging."

TRESPASS TO TRY TITLE.

See "Ejectment."

TRIAL.

See "New Trial"; "Witnesses."

Trial of actions by or against particular classes of persons.

See "Attorney and Client," § 2.

Trial of particular civil actions or proceedings.

See "Negligence," § 2.

For death caused by operation of railroad, see "Railroads," §§ 1, 2.

For personal injuries, see "Master and Servant," § 5.

For services of attorney, see "Attorney and Client," § 2.

Trial of criminal prosecutions.

See "Criminal Law," §§ 10, 11; "Perjury," § 2.

§ 1. Instructions to jury—Necessity and subject-matter.

Plaintiffs, claiming a lien thereon for wages under the statutes of Vermont, and also a general indebtedness, attached certain logs and pulp wood in the possession of a contractor, who had agreed to sell and deliver the same to defendants in New Hampshire, and had given them a mortgage thereon. Pursuant to some agreement made between one of the plaintiffs and one of the defendants, plaintiffs released the attachment, and the property was delivered to defendants. Having obtained a judgment against the contractor, plaintiffs demanded payment of the same from defendants, and, being refused, brought suit in a federal court, alleging that defendants had promised to pay such judgment when the attachments were released. This was denied by defendants, who claimed that their agreement was to account for the logs in case plaintiffs established a lien thereon. The only witnesses upon the issue were the two persons between whom the agreement was made, who contradicted each other. Under the laws of Vermont, defendants would have had the right to contest the validity of plaintiff's lien. *Held*, that such laws were material as bearing upon the disputed question of fact as to the actual agreement made, and that it was error for the court to refuse defendant's request to present them to the jury in its charge.

—Burgess Sulphite Fibre Co. v. Drew, 157 Fed. 212. 84 C. C. A. 660

§ 2. — Construction and operation.

In an action by a servant against the master to recover for a personal injury alleged to have been caused by a defective appliance furnished by the defendant, expressions used by the court, in its charge, that, under the circumstances, it was the duty of defendant to furnish and maintain reasonably safe appliances, are not ground for reversal, where the duty of defendant was elsewhere explained as not being absolute, and where at defendant's request the jury were specifically instructed at the close

of the charge that it was the duty of the defendant only to use reasonable and ordinary care.

—Katahdin Pulp & Paper Co. v. Peltomaa, 156 Fed. 342.....
84 C. C. A. 238

§ 3. Custody, conduct, and deliberations of jury.

A court has a wide discretion in the matter of charging the jury, and may bring the jury in at any time and give them additional instructions, whether requested or not; and where they ask for additional instructions on a particular question it is not error for the court also to further instruct them on other issues.

—Charlton v. Kelly, 156 Fed. 433.....84 C. C. A. 295

TRUSTS.

Trust deeds, see "Mortgages."

§ 1. Creation, existence, and validity—Constructive trusts.

One of defendants, on behalf of himself and his codefendants, who were his partners in the freighting business in Alaska, entered into an agreement with plaintiff by which the latter was to locate mining claims in the name of some one of defendants, who were to record the locations and pay the cost of recording, plaintiff to have a half interest in such claims, and defendants together the other half interest. From that time forward defendants as partners engaged in dealing in and working mining claims. Plaintiff located certain claims, and delivered the location notices to defendants, who did not, however, record the same, but, after the time for recording them had expired, relocated the claims for their joint benefit. *Held*, under the evidence, that defendants became partners for mining purposes from the time of the agreement made with plaintiff, and were all bound by such agreement; that their action in failing to perfect plaintiff's locations, and in relocating the claims, was for the fraudulent purpose of cheating plaintiff of his half interest; and that in equity they held such interest as trustees, for his benefit.

—Cascaden v. Dunbar, 157 Fed. 62; Dunbar v. Cascaden, Id.....
84 C. C. A. 566

§ 2. Establishment and enforcement of trust.

The rule that, where a bank has mingled trust money with its own funds, money paid out from such fund for its own purposes will be presumed to have been paid from its own money, and not from the trust fund, is qualified by the further rule that, if the mingled fund is reduced at any time below the amount of the trust fund, the latter must be regarded as dissipated, except as to such balance, and sums subsequently added from other sources cannot be treated as a part of the trust fund.

—Board of Com'rs of Crawford County, Ohio, v. Strawn, 157 Fed. 49
84 C. C. A. 553

Under the statutes of Ohio a county treasurer has no authority to deposit taxes collected as a general deposit in a bank, and the bank can acquire no title to money so deposited as against the county, nor can an estoppel arise from any act of its officers which will prevent its recovery of such money from a receiver of the bank when it can be identified or traced into other property where it has been mixed with funds of the bank.

—Board of Com'rs of Crawford County, Ohio, v. Strawn, 157 Fed. 49
84 C. C. A. 553

The mere misapplication of a trust fund does not create a general lien on the tort-feasor's estate, but, to entitle the owner to recover such fund from a receiver of the trustee, it must be traced either in its original form or into specific property which passed to the receiver.

—Board of Com'rs of Crawford County, Ohio, v. Strawn, 157 Fed. 49
84 C. C. A. 553

The cashier of a national bank in Ohio, at the time it went into the hands of a receiver in insolvency, was a deputy county treasurer, and had

for some time previously been collecting taxes at the bank, which were deposited in the bank to the credit of the treasurer, and mingled with the bank's funds. Neither of such officers had any power under the law to make such deposits nor to part with title to the money. Of the funds of the bank with which such taxes were mingled, a certain amount, less than the trust funds, remained on hand at all times, and there was a still larger amount in the fund when the receiver was appointed. *Held*, that the county was entitled to recover from the receiver, as a part of the trust fund, so much of the cash taken possession of by the receiver as equaled the lowest cash balance remaining in the bank at any time while the taxes were being collected, together with the collections subsequently made, but that it could not recover the proceeds of commercial paper acquired by the bank during such time and collected by the receiver, without establishing by proof that the tax money, or the fund in which it was mingled, in fact went into such paper.

—Board of Com'rs of Crawford County, Ohio, v. Strawn, 157 Fed. 49
84 C. C. A. 553

UNFAIR COMPETITION.

See "Trade-Marks and Trade-Names," § 2.

UNITED STATES.

See "Customs Duties"; "Post Office."

Courts, see "Courts," § 2; "Removal of Causes."

Judgment in state court as bar to suit in United States court, see "Judgment," § 3.

VENDOR AND PURCHASER.

See "Sales."

Requirements of statute of frauds, see "Frauds, Statute of," § 1.

VERDICT.

Review on appeal or writ of error, see "Appeal and Error," § 8.

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See "Master and Servant," § 2.

VILLAGES.

See "Municipal Corporations."

WAGES.

Of servant, see "Master and Servant," § 1.

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See "Estoppel."

Of objections to proceedings in equity, see "Equity," § 3.

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WRITS.*Particular writs.*

See "Injunction"; "Mandamus."

Writ of error, see "Appeal and Error."

YEAR.

Estates for years, see "Landlord and Tenant."

[END OF VOLUME.]

84 C.C.A.—49

